Supreme Court, U. S.
FILED
JUL 9 1977
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1977

No. 77- 77-54

JOSEPH D. BEASLEY, M.D.,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

LEONARD B. BOUDIN
30 East 42nd Street
New York, New York 10017

ARTHUR A. LEMANN, III
P.O. Box 49
New Orleans, Louisiana 70118

Attorneys for Petitioner

On the Petition
HERBERT JORDAN
Rabinowitz Boudin & Standard
New York, N.Y. 10017

July 9, 1977

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statement of the Case	3
Reasons for Granting the Writ	18
Conclusion	26
Appendix A: Opinion of the Court of Appeals	1a
Appendix B: Judgment of the Court of Appeals Affirming Conviction	42a
Appendix C: Judgment of the Court of Appeals Affirming Order Refusing to Dismiss the Indictment or to Order a New Trial...	44a
Appendix D: Opinion of the District Court	46a

Table of Authorities

Cases:

Berger v. United States, 295 U.S. 78	18
Beverly v. United States, 468 F.2d 732 (5th Cir. 1972)	24

Cases:	Page
Brady v. Maryland, 373 U.S. 83...	20,22
Earl v. United States, 361 F.2d 531 (D.C. Cir. 1966)	23
Giglio v. United States, 405 U.S. 150	19
Mesarosh v. United States, 352 U.S. 1	18
Napue v. Illinois, 360 U.S. 264..	19
United States v. Agurs, 427 U.S. 97	18,20,21
United States v. Alessio, 528 F.2d 1079 (9th Cir. 1976), cert. denied, 426 U.S. 948..	23
United States v. Dardi, 330 F.2d 316 (2d Cir. 1964), cert. denied, 379 U.S. 845	24
United States v. Doe, 455 F.2d 1270 (1st Cir. 1972)	24
United States v. Star, 470 F.2d 1214 (9th Cir. 1972)	24,26

Statutes:

18 U.S.C. § 1623	2,8,14, 16,17,25
18 U.S.C. §§ 6002-6003	10,22

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-

JOSEPH D. BEASLEY, M.D.,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Joseph D. Beasley, M.D., petitions for a writ of certiorari to review the judgments of the United States Court of Appeals for the Fifth Circuit affirming his conviction under 18 U.S.C. §§ 371, 287 and 2, and affirming the denial of his postconviction motions for dismissal of the indictment or a new trial.

OPINIONS BELOW

The opinion of the court of appeals

(App. A) is reported at 550 F.2d 261. The district court's opinion denying the postconviction motions to dismiss or for a new trial (App. D) is unreported.

JURISDICTION

The judgments of the court of appeals (App. B and C) were entered on April 8, 1977. On May 10, 1977 the court of appeals denied a petition for rehearing. On June 3, 1977 Mr. Justice Powell extended the time for filing a petition for certiorari to and including July 9, 1977. Jurisdiction is conferred on this Court by 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner was entitled to dismissal of the indictment or a new trial because of the prosecutors' post-trial disclosure under oath that they obtained the testimony of a key trial witness by threatening to indict him for perjury, whereas at trial they (a) stood by silently while the witness falsely told the jury that he was testifying voluntarily, and (b) misled court and jury by requesting and receiving a charge on voluntary recantation under 18 U.S.C. § 1623?

2. Whether petitioner was entitled to dismissal of the indictment or a new trial because of the prosecutors' post-trial disclosure that, contrary to what the trial jury was told, a key witness testified at trial pursuant to an undisclosed deal that he would not be prosecuted for prior alleged perjury

before the grand jury?

3. Whether petitioner was entitled to dismissal of the indictment or a new trial because of the prosecutors' post-trial disclosure that they obtained the trial testimony of a key witness by means of postindictment utilization of the grand jury?

4. Whether petitioner was entitled to dismissal of the indictment or a new trial because of the prosecutors' post-trial disclosure that, although they had learned from pre-trial interviews with two immunized potential witnesses that they would contradict the two key prosecution witnesses, the prosecutors (a) decided at trial not to call the witnesses, (b) concealed from petitioner that their testimony would be exculpatory, and (c) gave petitioner a written summary which falsely indicated that their testimony would be incriminating?

5. Whether if, as the district court believed, the validity of petitioner's conviction depended upon what the trial testimony of the immunized witnesses would in fact have been, due process required either that they be compelled to testify at the post-trial hearing or that the indictment be dismissed?

STATEMENT OF THE CASE

Petitioner, a Doctor of Medicine and Dean of the Tulane School of Public Health and Tropical Medicine, was indicted on March 19, 1974. The charges

arose from petitioner's work as chairman of the widely acclaimed Family Health Foundation in New Orleans, a non-profit Tulane affiliate which designed and administered model family and health planning programs for the disadvantaged. The indictment charged petitioner with conspiracy, 18 U.S.C. §§ 371 and 2, and with two substantive counts of filing false claims with the United States, 18 U.S.C. §§ 287 and 2. Also indicted were petitioner's former assistants, Oscar Kramer and Eugene Wallace, and others.

In January of 1975 the case against petitioner and Kramer was tried, but the jury was unable to reach a verdict as to petitioner. A second trial of petitioner was held from March 12 through March 17, 1975, and he was convicted on all three counts. Wallace was never tried because he agreed to testify against petitioner and to plead guilty and accept a suspended sentence on one count in exchange for dismissal of the others.

The case against petitioner was prepared and tried primarily by Assistant United States Attorneys James Carriere and Don Richard. Most of the key facts relating to the questions presented on this petition were disclosed after trial when, in a Louisiana state court proceeding, Carriere and Richard gave unprecedented, extensive testimony under oath as to their preparation and conduct of petitioner's trial. However, in order to provide perspective for an understanding of these startling post-trial revelations, it is necessary first to describe aspects of the trial in some detail.

The government's case on all three counts revolved around transactions of Family Health Foundation relating to mobile family health clinics. Pursuant to contract with the State of Louisiana the Foundation purchased a number of these clinics from a contractor, one Dufrechou. The State reimbursed the Foundation for the cost of the clinics and in turn received reimbursement for 75 to 90% of the cost from the United States pursuant to Title IV-A of the Social Security Act, 42 U.S.C. §§ 601 et seq.

The government charged and sought to prove the following: Petitioner desired to provide one Sherman Copelin with the sum of $50,000 or more via the Foundation. In order to accomplish this a scheme was devised by members of petitioner's staff, principally Eugene Wallace and Don Hubbard. Under the scheme the Foundation would ask Dufrechou to enter into a contract with a New York consulting firm, the Scholarship, Education and Defense Fund for Racial Equality (SEDFRE), for the provision of consulting services in connection with the clinics. The executive director of SEDFRE, Ronnie Moore, was a friend of Hubbard. SEDFRE would bill Dufrechou for the services, and Dufrechou would add this cost to the price paid by the Foundation for the clinics at a rate of $4400 each. SEDFRE would pay over to Copelin the sums which it received from Dufrechou. Under the government's theory it was explicit from the outset that SEDFRE would perform no services for Dufrechou, that Copelin would perform none for SEDFRE,

and that petitioner knew of this arrangement and approved it. In short, the government's contention was that petitioner, his staff, and Moore and Copelin knowingly set up SEDFRE as a conduit to pass to Copelin government-reimbursed funds which constituted no legitimate part of the cost of the clinics.

It has never been disputed that SEDFRE entered into a contract with Dufrechou for services in connection with the clinics and that SEDFRE's billings were added to the cost of the clinics. Nor has it been disputed that Copelin received money from SEDFRE, although in amounts differing from those which SEDFRE received from Dufrechou. What has been and still is disputed is that the relationship between SEDFRE and Dufrechou and the relationship between SEDFRE and Copelin were created for the sham purpose of providing a conduit of funds to Copelin, and that petitioner knew of and approved this purpose.

At the trial the government called the Dufrechous, Wallace and Moore. The Dufrechous testified that when they entered into the contract with SEDFRE they believed that it was entirely legitimate and that SEDFRE would render services. Wallace and Moore, however, gave the crucial incriminating testimony.

Wallace testified that the Dufrechou-SEDFRE-Copelin relationships had been intended from the outset as merely a conduit to Copelin and that petitioner approved this (Tr. 3/17/75, pp. 119-20). Moore testified that Hubbard had come to

New York and asked him if SEDFRE would serve as a conduit (Tr. 3/14/75, p. 176).

The other potential witnesses on this crucial issue, Copelin and Hubbard, did not testify.1/ They had been granted immunity prior to trial and were subpoenaed by the government as trial witnesses. Government counsel provided petitioner with a purported summary of what Hubbard's testimony would be and indicated that Copelin's would be similar (Tr. 10/29/75, pp. 15-16, 24-5). The summary stated that Hubbard would testify that he and Copelin presented the arrangement to Moore as one "whereby SEDFRE could be used as the conduit of the money to Sherman Copelin." (Id., Gov.Ex. 2, p.2)

The prosecutors did not inform the defense in writing or otherwise that they possessed information that either Copelin or Hubbard would contradict the above testimony of Wallace and Moore.

At the close of the government's case, the government announced that Hubbard and Copelin would not be called (Tr. 10/29/75, pp. 17-18). The court offered to call them itself if petitioner so desired, but petitioner declined in view of the government's incriminating summary of their testimony (id.).

The credibility of Wallace and

---

1. Petitioner did not take the stand, although he had done so at the first trial.

Moore thus became pivotal. Government counsel disclosed to the jury that the government had made a deal with Wallace for his testimony (Tr. 3/17/75, pp. 100-102), and therefore the defense was able to draw Wallace's motives and credibility into question.

Moore, however, testified without intimating the existence of a similar deal. On direct examination by Carriere he testified that he had appeared three times before the indicting grand jury (Tr. 3/14/75, pp. 190-200). He said that in the first two appearances he had testified that the Dufrechou-SEDFRE relationship and the SEDFRE-Copelin relationship were of independent origins and were not conceived to create a conduit to Copelin (id., pp. 198-9). He said that this earlier grand jury testimony was untrue and that, later, after consulting his counsel, he made a decision to return to the grand jury and tell the truth as he was telling it to the trial jury (id., p. 200). At the government's request the court instructed the jury that under 18 U.S.C. § 1623 a person who has testified falsely before a grand jury cannot be convicted of perjury for the testimony if, before the falsity is discovered, he reappears and testifies truthfully (id., pp. 234-5).

At the close of the government's case both sides rested. In his summation, government counsel Carriere stressed -- as he had in his opening statement -- that the participants, including petitioner, had intended the Dufrechou-SEDFRE-Copelin relationships as nothing more

than a sham or conduit from the outset (Tr. 3/17/75, pp. 177-9, 184-5). He also emphasized at least twice the credibility of Moore (id., pp. 184-5, 231). The jury responded with a verdict of guilty.

Subsequently, in June of 1975, the state grand jury of Orleans Parish indicted petitioner, Kramer, Copelin and Hubbard on charges relating to the same subject as the federal indictment. After an extensive pretrial hearing on July 28 and 29, 1975 the state court quashed the indictment as to petitioner and Kramer on grounds of double jeopardy and, as to Copelin and Hubbard, on the ground that the prosecution was an impermissible fruit of information given by them to the United States Attorney pursuant to the federal immunity granted them. The state did not appeal.

At the state court hearing the state called petitioner's federal prosecutors as witnesses in an attempt to prove that the state's evidence against Copelin and Hubbard -- including that contained in the record of petitioner's federal trial -- had not been derived from information which Copelin and Hubbard gave the federal prosecutors pursuant to the immunity grants. The prosecutors testified extensively concerning the development and conduct of the government's case against petitioner. The testimony of chief prosecutor Carriere, for example, fills more than 100 pages of transcript.

This testimony disclosed that when petitioner, Kramer and Wallace were indicted on March 19, 1974 the government

had no witness who could testify that the Dufrechou-SEDFRE-Copelin relationships were set up as a sham or conduit and, of course, no witness that any defendant had approved or participated in setting up such a thing (State Tr., pp. 100-105). Moore had twice testified the contrary before the grand jury (id., p. 70). Copelin and Hubbard had refused to testify or provide information, invoking their privilege against self-incrimination under the Fifth Amendment (id., pp. 22-3).

Shortly after the indictment was filed the prosecutors obtained an order under 18 U.S.C. §§ 6002-6003 granting Copelin use immunity with respect to any information given by him before the grand jury or at trial (id., p. 16). While no such order was obtained as to Hubbard, he received de facto use immunity by way of clear and explicit assurances from the prosecutors that he would not be prosecuted based on information which he might give to them (id., p. 18).

Copelin and Hubbard then began talking freely to the prosecutors. Between petitioner's indictment and trial Copelin was interviewed by the prosecutors at least three times and Hubbard at least twice (id., pp. 201-2).2/ Carriere testified in the state court hearing as follows:

---

2. On May 7, 1974 Copelin appeared briefly before the grand jury and gave testimony on a subject which was not involved in petitioner's trial (id., pp. 21-2, 26).

> "Q. Now, insofar as the testimony of Mr. Hubbard and Mr. Copelin and I am including in there the interviews, the substance of their interviews and the length and breadth of all their interviews with you and Mr. Richard, and I ask you if it did, the testimony or the evidence they gave to you, did it assist you in any way in focusing your investigation of the matter?
>
> "A. No, it did not because their stories contradicted the stories of Eugene Wallace and the later testimony of Ronnie Moore." (Id., p. 205)

Carriere then testified that the government's final decision not to call either Copelin or Hubbard at petitioner's trial was not made until the close of the government's case (id., p. 215). Carriere testified repeatedly concerning the basis for this decision:

> "So, I couldn't use any essential information that they gave me because it would have contradicted my other witness, Mr. Wallace." (Id., pp. 191-2)
>
> ". . . both Mr. Copelin and Mr. Hubbard denied Mr. Wallace's story. At some points they agreed, but for the critical points they disagreed. . . . They denied the basic Wallace story. Both of them denied it." (Id., p. 193)

". . . we elected not to use him or them because they would contradict Wallace and Moore." (Id., p. 215)

More specifically he testified:

"A. But, they denied the conduit deal.

"Q. Now, what do you mean denied? I mean, I can go with you when you say they portrayed them as separate, but --

"A. Mr. Hubbard and Mr. Copelin consistently denied that the transaction was a sham transaction in order to get money from Family Health Foundation to Mr. Copelin. Mr. Ronnie Moore testified that Mr. Hubbard came to him and asked him to enter into a conduit relationship, that is, the sham transaction in order to get money, $50,000, from Beasley to Copelin."

. . .

"A. With [Copelin and Hubbard's] testimony compared with the precise testimony of Moore to the effect that Mr. Hubbard came to him said a conduit --

"Q. That's the inconsistency. That's the inconsistency that made you think that it would be inadvisable to call them as government witnesses?

"A. Right." (Id., pp. 233-6)

In late August 1974, after Copelin received immunity, the prosecutors made their deal for defendant Wallace's testimony (id., p. 102). As Wallace then remained the only witness who supported the government's theory of the origins of the Dufrechou-SEDFRE-Copelin relationships, the prosecutors continued to search for others. In addition to continuing the fruitless series of interviews with Copelin and Hubbard, they turned their attention to Ronnie Moore (id., pp. 194-6).

Armed with Wallace to support their theory of what happened, the prosecutors decided to and did notify Moore through his counsel, Jeff Newman, that they would indict him for perjury in his two grand jury appearances, unless he provided them with a written statement of what they regarded as the true facts.3/ The prosecutors notified Moore that if he provided such a statement they would permit him to reappear before the grand jury and testify in accordance with his statement.4/

---

3. At the same time the prosecutors issued grand jury subpoenas to 12-14 employees of SEDFRE.

4. Carriere testified in state court:

"I said [to Mr. Newman], 'Well, if Mr. Moore comes in and tells the truth' -- as I believed the truth to be, then we would permit him to go before the Grand Jury and absolve himself of perjury.

"I told Mr. Newman that I wanted a

This, they said, would amount to a recantation under 18 U.S.C. § 1623 and they would therefore "not seek the perjury indictment." (Id., pp. 197-9)

Moore complied. As told by Carriere in the state proceeding:

> "A few days later, [Moore's local counsel] Mr. Whitman delivered to me a written statement by Ronnie Moore, detailing Ronnie Moore's perspective [sic] testimony concerning the SEDFRE transaction. In reading the Ronnie Moore statement, the Ronnie Moore statement contradicted what he had testified to before the Grand Jury on March 19th. It also contradicted the version of the SEDFRE transaction that Mr. Copelin had given to [the prosecution]. It also contradicted the interview that I had with Mr. Hubbard and Mr. Copelin on the 26th of November.
>
> "I received this statement on approximately the 1st of December of 1974. And that day or the next day Mr. Moore flew to New Orleans. I took him before the Grand Jury and

---

written statement from Ronnie Moore and that when I had the written statement and read it and if I believed Ronnie Moore now, this time with the written statement, I would permit him to come before the Grand Jury." (Id., p. 198)

he recanted his prior testimony and Ronnie Moore, then, was contradicting the version or the two versions of the modular clinic-SEDFRE transaction that Mr. Hubbard and Mr. Copelin had been giving us.

> "Q. All right. Now, did Moore's testimony before the Grand Jury on December 3rd, 1974 confirm or contradict the description of the transaction that Mr. Wallace had given you?
>
> "A. It confirmed portions of what Mr. Wallace had said. Ronnie Moore couldn't confirm what had happened in New Orleans that Mr. Wallace had told us about. But, it confirmed what had happened, so to speak, with the SEDFRE people as Mr. Wallace had told us, this is what had happened. So, in effect, it supported Mr. Wallace." (Id., pp. 199-200)

Carriere also testified unequivocally as to the prosecutors' purposes:

> "Q. [by Mr. Sobol] Now, I've got just two more areas. You told me -- asked me to get in touch with Jeff Newman and I said I would. And some period of time went by and you got in touch with his local lawyer and he was to get in touch with Jeff Newman and you essentially applied a third line of pressure on Moore by subpoenaing all of his employees.

Firstly, is it fair to say what your goal really was was to get Moore to be a witness in the Beasley trial?

"A. There's no question about that.

"Q. And isn't it also fair to say that a threat of perjury was being thrown out to him toward that end?

"A. It wasn't a threat, Mr. Sobol.

"Q. A statement of fact.

"A. That was a statement of fact. I was going to seek the indictment of Ronnie Moore for perjury. It was actually not for perjury, it was for making false declarations to the Grand Jury. I was going to indict him under 18 U.S.C. 1623.

"Q. And that was made known to him?

"A. No question about it. I was going to indict him." (Id., pp. 263-4)

Based upon the prosecutors' startling testimony at the state hearing, petitioner moved in the district court for an order setting aside his conviction and dismissing the indictment, or in the alternative for a new trial. Petitioner sought relief on the grounds that (1) the prosecutors deliberately deceived the jury (a) by standing silent while Moore falsely testified that he

had voluntarily recanted the exculpatory version which he twice gave the grand jury, (b) by not disclosing that Moore's trial testimony was the result of a deal whereby they agreed not to indict him, and (c) by requesting and receiving the charge on voluntary recantation under 18 U.S.C. § 1623; (2) the prosecutors obtained Moore's trial testimony unlawfully by utilizing the grand jury for that specific purpose after petitioner's indictment; (3) the prosecutors deliberately concealed from petitioner, the trial court and the jury the fact that Copelin and Hubbard would contradict the crucial incriminating testimony of Wallace and Moore; and (4) the prosecutors misled petitioner by stating falsely that Copelin and Hubbard would support Wallace and Moore.

After receipt of the motion papers, including a transcript of the state court hearing, the district judge stated that it was essential to have Copelin and Hubbard testify as to what in fact they would have said if called at the trial. Petitioner disagreed on the ground that nothing more was needed than the prosecutors' extensive, sworn testimony in the state hearing concerning what they believed Copelin and Hubbard's testimony would be based upon their numerous interviews with these immunized witnesses. (Letter of Arthur A. Lemann III, dated October 20, 1975.)

The court then proposed to call Copelin and Hubbard as court witnesses (id.). Copelin and Hubbard, however, refused to testify on Fifth Amendment grounds, unless

they were assured of immunity as to their testimony, pursuant either to the immunity granted them more than a year earlier or to a new grant of immunity. No such assurance was given by the government, and the court ruled that Copelin and Hubbard could not be required to testify (Tr. 11/5/75, pp. 9-12).5/

After a brief hearing, the court denied the motions. The court of appeals affirmed both the judgment of conviction and the denial of the post-trial motions, and denied a petition for rehearing.

REASONS FOR GRANTING THE WRIT

This case presents several important, interrelated issues concerning the duty of federal prosecutors to see that justice is done rather than to obtain convictions by manipulating the fact finding processes at their disposal and then concealing the truth from the defendant, court and jury. See, e.g., United States v. Agurs, 427 U.S. 97, 110-111; Mesarosh v. United States, 352 U.S. 1, 14; Berger v. United States, 295 U.S. 78, 88.

This is by no means a case where the evidence of guilt was so overwhelming that a fair and lawful trial would inevitably

---

5. The court held that Copelin could be required to testify as to the subject of his prior grand jury testimony (Tr. 11/5/75, p. 9). However, as that testimony was totally irrelevant to the issues at petitioner's trial, Copelin was not put on the stand (id.).

or even probably yield the same result. In fact, the jury in petitioner's first trial was unpersuaded by the government's case.

1. The credibility of Moore's testimony as to the origins of the Dufrechou-SEDFRE-Copelin relationships was crucial, especially in view of the impeachability of the government's only other witness, Wallace. Hence, under Giglio v. United States, 405 U.S. 150, 155, "evidence of any understanding or agreement as to a future prosecution would be relevant to his credibility and the jury was entitled to know of it." As in Giglio, due process mandated at least a new trial when it was proven that there was such an agreement or understanding with Moore which was not disclosed to the jury.

This case is more aggravated than Giglio. Unlike that case the prosecutors stood by silently while Moore falsely testified that he had voluntarily chosen on his own initiative to recant his exculpatory statement and substitute an incriminating one, whereas the prosecutors well knew that in reality Moore had changed his story for the sole purpose of avoiding their threatened perjury indictment. The prosecutors then further misled the jury by requesting the charge on voluntary recantation. Hence petitioner was entitled to dismissal or a new trial under Napue v. Illinois, 360 U.S. 264, where substantially the same thing occurred.

The court of appeals did not even cite Giglio or Napue. The court unaccountably stated in passing that "there

was no 'deal'" with Moore (App. 12a). The court's statement is clearly erroneous; indeed it is in direct conflict with the clear, sworn testimony of the prosecutors and has no support in the record or even in the district court's opinion.

2. Under Brady v. Maryland, 373 U.S. 83, petitioner's conviction should have been set aside when it was proven that the prosecutors not only failed to disclose that Copelin and Hubbard would have contradicted Wallace and Moore, but also represented falsely to petitioner that Copelin and Hubbard would support Wallace and Moore.

The court of appeals did not face up to this issue. The court emphasized what was given to the defense concerning Copelin and Hubbard (App., 12a-13a), but neglected to mention that this material was false and misleading. The court also failed to address itself to the basic fact that the prosecutors never intimated in the slightest to defense counsel that Copelin and Hubbard would contradict Wallace and Moore, and never provided the defense with any materials containing such an intimation, notwithstanding that the prosecutors were convinced from their numerous interviews that Copelin and Hubbard would so contradict the key government witnesses.

The reliance of the court of appeals upon United States v. Agurs, 427 U.S. 97 (App., 13a-14a) is misplaced. First, the discussion of materiality in Agurs which the court of appeals quoted applies only

to undisclosed exculpatory information which at trial was neither (a) specifically requested by the defense nor (b) "so clearly supportive of a claim of innocence that it gives the prosecution notice of a duty to produce." 427 U.S. at 107. The information that Copelin and Hubbard would contradict the key prosecution witnesses falls easily into the latter category. That the prosecutors were on notice of the existence of this fact and of its crucial value to the defense is shown by their testimony that it formed the basis for their decision during the trial not to call Copelin or Hubbard.

Second, even if the materiality test of Agurs were applicable, petitioner would be entitled to a new trial. In Agurs this Court held that, upon the post-trial discovery that during trial the prosecutors possessed exculpatory information which was neither specifically requested nor clearly supportive of the defense, a new trial need not be granted if there is "no reasonable doubt about guilt whether or not the additional evidence is considered." 427 U.S. at 112-13. In Agurs the trial judge "indicated his unqualified opinion that respondent was guilty," 427 U.S. at 113, based upon what this Court regarded as a "firsthand appraisal of the record [which] was thorough and entirely reasonable," 427 U.S. at 114. This Court therefore upheld the denial of a new trial. In the present case neither the trial court nor the court of appeals made any such appraisal or finding, nor is it likely that they could in view of the fact that the first jury could not even agree on

a verdict.6/

3. This case raises a novel and vital question concerning the limits of the government's discretion to grant or withhold use immunity under 18 U.S.C. §§ 6002-3.

Petitioner's position below and here is that it was unnecessary for Copelin and Hubbard to testify at the post-trial hearing, because the conviction should have been set aside on Brady grounds on the basis of the prosecutors' testimony that their interviews indicated that Copelin and Hubbard would have contradicted Wallace and Moore. If, however, as the district court believed, the validity of the conviction depended upon Copelin and Hubbard's post-trial testimony, fundamental fairness required either that they be required to testify or that the conviction be set aside.

Our system of justice cannot tolerate a situation where prosecutors are permitted to grant immunity to a witness,

---

6. The trial judge stated that he saw "nothing . . . that would have altered the result." App. 14a. This speculation on jury reactions is far different from a statement that the judge is convinced of petitioner's guilt. Even more importantly, the judge did not have before him the exculpatory testimony which the prosecutors stated that Copelin and Hubbard would give, because he declined to require them to testify and disclose it. See section 3 below.

receive information from him which they themselves characterize under oath as exculpatory, and then join with the trial court in preventing the defendant from obtaining the exculpatory information. Cf., Earl v. United States, 361 F.2d 531, 534 n. 1 (D.C.Cir. 1966), where then Judge Burger argued that, consistent with due process, "the Government could not use the immunity statute for its advantage unless Congress made the same mechanism available to the accused."7/ It may be that the government cannot be compelled to grant immunity, but in the circumstances of this case it can be and must be compelled to accept dismissal of the indictment if it is unwilling to grant the immunity required to resolve the issues raised by the prosecutors' testimony. The government has nothing to lose by doing so because Copelin and Hubbard are already immunized from prosecutorial use against them of the information which they gave the prosecutors and which they would be called upon to repeat in court. Indeed, even if no further immunity were granted the district court could have and should have compelled them to testify pursuant to the original grants of immunity under which they gave the information to the prosecutors.

The court of appeals did not address this issue. Further, the court's discussion, App., 15a-17a, betrays an erroneous

---

7. See also United States v. Alessio, 528 F.2d 1079 (9th Cir. 1976), cert. denied 426 U.S. 948.

reading of the record. Contrary to the court's statements, it was the district judge, not petitioner, who wanted Copelin and Hubbard to testify at the post-trial hearing. Also, "Copelin's testimony" which the court regarded as "not 'inherently contradictory' of either Wallace's or Moore's testimony" (App., 17a), is the testimony given by Copelin to the grand jury on a totally irrelevant topic. To this day only the prosecutors have heard from Copelin as to what his testimony is on the issues that were tried, and they characterized it as contradictory of both Wallace and Moore.

4. The court of appeals acknowledged the prevailing rule in the lower courts that "prosecutorial agents may not use the Grand Jury for the primary purpose of strengthening its case on a pending indictment or as a substitute for discovery," (App., 10a-11a).8/ But the court erroneously held that the rule was not violated in this case.

The court agreed with the trial court's finding that the prosecutors' primary purpose in getting Moore to change his testimony before the grand jury "was not one of gathering evidence against" petitioner

---

8. See, e.g., United States v. Star, 470 F.2d 1214 (9th Cir., 1972); Beverly v. United States, 468 F.2d 732 (5th Cir. 1972); United States v. Doe, 455 F.2d 1270 (1st Cir. 1972); United States v. Dardi, 330 F.2d 316 (2d Cir. 1964), cert. denied 379 U.S. 845.

(App., 11a). This view has no support whatever in the record and is totally contrary to the clear testimony of the prosecutor at the state court hearing. Neither the trial court nor the court of appeals cited a single evidentiary fact to support this finding.

There is no basis for the court's statement that the prosecutors' "principal reason" for bringing Moore in was to present an indictment or provide an opportunity for him to recant (App., 11a-12a). That is merely a description of what the prosecutors did -- or threatened to do -- not a statement of their purpose. Their admitted sole purpose was to get Moore as a witness against petitioner.9/

---

9. At the post-trial hearing in the district court Carriere testified that he had a "two-fold purpose", namely to advise Moore that he could recant and to "get him to testify." (Tr. 10/29/75, pp. 12-13) This self-serving attempt to undo the thorough and obviously candid testimony at the state hearing was entitled to no weight. It remains clear that advising Moore that he could either recant or be indicted was the method, not the purpose. When questioned at the district court hearing Carriere declined to deny that the "real goal" was to get Moore as a witness (id., pp. 37-8). Moreover, it is obvious that the recantation statute, 18 U.S.C. § 1623(d), was inapplicable because the falsity of Moore's orig-

No court has had occasion to decide what the remedy should be for unlawful use of a grand jury to gather evidence on a pending indictment. However, this is a classic situation for application of the exclusionary rule, and lower courts have so suggested in dictum.10/ Just as this Court does not countenance the use at trial of evidence obtained through an unlawful search, so should it not countenance the use of evidence obtained by unlawful use of the grand jury, or by any other unlawful means.

As there is a very substantial probability that Moore's testimony was decisive in this close case, the courts below should have ordered a new trial and ordered Moore's testimony suppressed.

CONCLUSION

The petition should be granted for the reasons stated.

Respectfully submitted

Leonard B. Boudin
Arthur A. Lemann, III

Attorneys for Petitioner

July 9, 1977

---

inal testimony -- if it was false -- had already become manifest to the prosecutors.

10. See, e.g., United States v. Star, supra, 470 F.2d at 1217.

APPENDIX A

Opinion of the Court of Appeals

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JOSEPH D. BEASLEY, M.D.,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

OSCAR E. KRAMER, JR.,
Defendant-Appellant.

Nos. 75-2223, 75-4147, 75-1929

United States Court of Appeals,
Fifth Circuit.

April 8, 1977

Appeals from the United States District Court for the Eastern District of Louisiana.

Before GOLDBERG, SIMPSON and FAY, Circuit Judges.

FAY, Circuit Judge:

These appeals arise from the convictions and lower court's denial of post-trial motions of two appellants who were tried by juries and found guilty of violating the general conspiracy statute, 18 U.S.C. § 371 and § 2, and of filing or causing to be filed false claims, as proscribed by 18 U.S.C. § 287 and § 2.[1] Finding no merit in any of the many assignments of error, we affirm.

More specifically, Count I charged Dr. Joseph Beasley, Oscar Kramer, and other named persons with conspiracy to defraud the United States through the United States Department of Health, Education and Welfare (HEW), of its right to have its program under Title IV–A of the Social Security Act administered fairly, honestly and free from corruption, deceit, trickery, and dishonesty. The means by which the defendants accomplished the conspiracy were: (1) by presenting claims for approximately $659,580 to the State of Louisiana allegedly representing construction costs

1. 18 U.S.C. § 2, is the aiding and abetting statute.

for 15 mobile modular clinics which were never constructed and the money diverted to other purposes, knowing that the State of Louisiana would be reimbursed for a substantial portion of the money by the United States; (2) by adding to the cost of 27 mobile modular clinics approximately $4,400 each, knowing that the added cost, totaling approximately $118,800 did not form any part of the purchase price of the clinics and constituted no legitimate authorized expenditure under the existing contract between the Foundation and the State of Louisiana, and then presenting claims for the added cost to the State of Louisiana knowing that the State would be reimbursed by the United States for a substantial portion of the money claimed; (3) by falsifying, concealing, and covering up by trick, scheme, and device material facts concerning the mobile modular clinic transactions from the federal auditors.

Counts II and III charged Beasley, Kramer and others with substantive violations of 18 U.S.C. § 287 and § 2. Count II alleged that the defendants made and presented claims of approximately $52,800 to the United States through the State of Louisiana knowing the claims to be false, fictitious, and fraudulent in that they did not form any part of the purchase price of mobile modular clinics and constituted no legitimate authorized expenditure under the contract between the Foundation and the State of Louisiana.

Count III alleged another violation of 18 U.S.C. § 287 and § 2 involving claims of approximately $66,000. The false, fictitious, and fraudulent nature of these claims was the same as alleged in Count II.[2]

BACKGROUND

Dr. Beasley and Mr. Kramer went to trial on January 10, 1975. After completion of the government's case, Kramer was called as a witness by and testified on behalf of Beasley. A mistrial was then declared as to Kramer. The trial of Beasley continued, but it resulted in a mistrial when the jury was unable to return a verdict.

The government brought Kramer to trial for the second time and on March 11, 1975, the jury returned a verdict of guilty as to all three counts. The defendant was subsequently sentenced to serve two years on each count to run concurrently. Kramer appeals this conviction.

The retrial of Dr. Beasley began on March 12, the day following Kramer's verdict, and on March 17, Beasley was found guilty and later received the same sentence. Subsequently, Beasley filed an alternative motion to dismiss the indictment or for new trial, and from the district court's denial of this motion, Beasley appeals.

2. Originally the indictment contained a Count IV and Count V, with Beasley named in both and Kramer only in Count IV. Although the lower court denied appellants' motions to dismiss these counts, the government dismissed them before trial.

It should be noted that this Court entertains no doubt as to the many good things accomplished by the Family Health Foundation and the appellants. Their work for the individual, the scientific and professional communities, and society as a whole is admirable and commendable. Nonetheless, their greed provoked criminal actions which cannot be ignored or excused.

Appellants were involved with a social-economic welfare program funded by federal-state cooperation. Pursuant to Title IV–A of the Social Security Act (42 U.S.C. § 601 et seq.), states that provide family planning services to families receiving benefits through the Aid to Dependent Children program may be reimbursed from federal funds for 75% of the cost until January 1, 1973, and for 90% of the cost after that date. Louisiana, with the approval of HEW, contracted with the non-profit corporation, Family Health Foundation, to provide these services for its citizens. The Foundation would incur an expense and bill the state, the state would pay the Foundation, and the state would then be reimbursed by the federal government.[3]

3. This case involved fiscal year 1972–1973. According to the briefs submitted by the government, the total expenses billed by the

During the time covered in the indictment, Dr. Beasley was the chief executive officer of the Foundation and Kramer, an attorney, was director of the Louisiana Family Planning Program, comptroller of the Foundation, and later a paid consultant of the Foundation. The executive assistant to appellant Beasley during the period of time covered by the indictment was Eugene Wallace, Jr., also an attorney and originally a co-defendant.[4]

Pursuant to its contract, the Foundation presented to the state claims for thirty-seven mobile modular clinics. The indictment alleged and the verdicts of the juries indicate they found that these claims were, in effect, submitted to an agency of the federal government, namely HEW, and that they were false or fraudulent in that (a) $4,400, which formed neither part of the purchase price nor any other legitimate expense, was "added-on" to the construction price

Foundation to the State was approximately $8.4 million of which 75-90% was paid by the United States. In fiscal year 1973-1974, the federal government provided 93% of the Foundation's revenue; of a total budget of $17.9 million, $480,331 were private funds, $750,000 were state funds, and $16.7 million were federal funds.

4. Wallace plead guilty to Count I, for which he received a suspended sentence, and testified as a government witness against Beasley and Kramer. The government dismissed the other charges against him.

of twenty-seven of the thirty-seven clinics and (b) fifteen of the twenty-seven clinics were never constructed. The government's theory is that appellants' procedure of inflating claims was part of a scheme to channel $50,000 to one Sherman Copelin[5] through a New York consulting firm, Scholarship, Education and Defense Fund for Racial Equality [SEDFRE].[6] The government also

5. The Foundation also had a $3.5 million annual Model Cities contract through the City of New Orleans and the United States Department of Housing and Urban Development (HUD) to staff and maintain neighborhood health clinics. Sherman Copelin was the Director of the New Orleans Model Cities program and, in effect, the supervisor of the Foundation's Model Cities contract.

6. The evidence in the light most favorable to the government shows that Copelin wanted to leave public employment and begin his own consulting firm in New Orleans. He and an associate of his, Don Hubbard, asked Beasley for $100,000 "seed money" from the Foundation. Beasley and Wallace told Copelin that the Foundation could not come up with $100,000 cash, but could put Hubbard on the Foundation's payroll and give $50,000 cash to Coeplin. Eventually, as a way of getting the money for Copelin, the defendants decided to claim the added expense in the cost of the construction of 12 mobile clinics. They arranged for the contractor to bill the extra amount and then siphon it through SEDFRE to Copelin, with Kramer explaining to the contractor that the added cost was the only way the Foundation could purchase a day care study from SEDFRE. SEDFRE's executive director was Ronnie Moore, a friend of Don Hubbard. Moore agreed to accept the contractor's

proved that the conspirators concealed the above transactions by later submitting certain false reports in response to the federal auditor's questions concerning the transactions.[7]

---

checks and then send SEDFRE's checks to Copelin. The $4,400 added on to the cost of each of the twelve clinics (totalling $52,800) forms the basis of Count II.

Kramer later instructed Foundation employees to prepare additional purchase orders for 15 clinics, but to hold and not deliver them to the contractor. The inflated costs for these clinics forms the basis of Count III charging a false claim, and the total cost of these clinics, which were never built, forms the basis of Part C(1) of Count I.

7. A private accounting firm discovered the issuance and nondelivery of the purchase orders and also the contractor's payments to SEDFRE. The defendants then decided that some work product with a SEDFRE label on it was necessary, so Kramer and Hubbard, per Beasley's instructions, went to New York and prepared a day care study and back-dated bills using SEDFRE's letterheads, typewriter and report covers which had been supplied by Moore. In an effort to explain the added cost to the accountant, the defendants and the contractors represented that this day care study was the work product of SEDFRE paid for by the contractors and billed to the Foundation.

When federal auditors began an audit of the Foundation in the Spring of 1973, Beasley, Kramer, and their staff prepared a "Modular Clinic File" which was represented to contain a complete and detailed explanation of the clinic program, including the added costs. As a result of the HEW audit, the Foundation prepared and submitted a response, which also contained misrepresentations as to the facts

ASSIGNMENTS OF ERROR

The first two assignments of error in Beasley's appeal concern the third appearance of Ronnie Moore before the Grand Jury in December, 1974, subsequent to appearances in November, 1973, and on March 19, 1974, the date of the indictment. Beasley contends that the primary purpose of the Grand Jury proceedings in December of 1974 was to secure the trial testimony of Moore. Beasley argues that the government's employing the Grand Jury for investigative purposes against the defendants ten months after indictment and one month prior to trial was a misuse of the Grand Jury and deprived him of his rights to due process and a fair trial. Beasley further contends that Moore's recantation at the December Grand Jury proceeding was not proper under the provisions of Title 18, U.S.C. § 1623(d), and that his appearance and subsequent trial testimony were the result of a "deal" that should have been disclosed to the court, jury and defense counsel.

---

surrounding the add-on to the cost of the clinics and the reason why the construction of the last 15 clinics was never authorized.

The defendants contended throughout their trial that day care centers were an appropriate concern of family planning and that Copelin and his associates were capable of providing a day care center study which the Foundation needed, but that a direct contract with Copelin was not feasible for political reasons.

Subsection (d) of § 1623, the recantation statute, reads:

> Where, in the same continuous court or grand jury proceeding in which a declaration is made, the person making the declaration admits such declaration to be false, such admission shall bar prosecution under this section if, at the time the admission is made, the declaration has not substantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed.

[1–4] We find that Moore's appearance before the Grand Jury in December was proper under this statute. When the government suspected that Moore had not told the truth during his first two appearances before the Grand Jury, they informed him that they were going to ask the Grand Jury to consider a false statement indictment against him, unless he appeared and recanted his prior false testimony. Moore had every right under 18 U.S.C. § 1623(d) to appear and recant in order to "save his own neck." There is nothing improper about the government continuing its investigation after an indictment is filed, with obvious limitations, of course. For example, the government cannot contact the defendant after an indictment is filed against him. Similarly, prosecutorial agents may not use the Grand Jury for the primary purpose of strengthening its case on a pending indictment or as a substitute for discovery, although this may be an incidental benefit. See *Beverly v. United States*, 468 F.2d 732 (5th Cir. 1972). However, it is not improper and indeed totally consistent with the duty of assistant United States attorneys to advise a witness that there exists a serious doubt or question about that witness' testimony.

[5] Appellant suggests that Moore's recantation was not legitimate under § 1623(d) since the government was aware of the falsity of Moore's original testimony before he offered to recant. The statute presents two conditions for recantation to be a bar to subsequent prosecution: (1) the person admits the falsity in the same continuous proceeding; (2) at the time the admission is made, the declaration has not substantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed. Although the second condition used the disjunctive "or" between substantial effect and exposed falsity, we need not decide whether the existence of one would be sufficient to permit prosecution, for no one here is challenging recantation as a bar to prosecution.

In the instant case, the trial judge found that the primary purpose of calling Moore before the Grand Jury in December was not one of gathering evidence against Dr. Beasley. We agree. The principal reason was to present to

the Grand Jury the question of false statements under 18 U.S.C. § 1623 or provide an opportunity to recant. Moore chose to recant. There was no sham here, and there was no "deal". Copies of the transcript of Moore's testimony at each of the three Grand Jury appearances were given to Beasley's counsel prior to the commencement of the first trial. The trial had not commenced and no prejudice resulted to the appellant.

Beasley next submits that the government did not disclose exculpatory statements of its immunized witnesses, Copelin and Hubbard,[8] and thus deprived Beasley of his rights to a fair trial and due process. The trial court found and, again, we agree, this assertion is unfounded.

[6] It is true that the government for reasons of its own decided not to call Copelin and Hubbard as witnesses. Nonetheless, a summary of Hubbard's statements and a memorandum prepared by Mr. Heusel, an Assistant United States Attorney, concerning an interview with Copelin in March of 1974 were given to defense counsel. The evidence indicates that the only difference between Copelin's statements at his first interview in March, 1974, and those at his second interview in January, 1975 (the notes of which were not given to Beasley), was that Copelin "knew" rather than "thought" his $1000 a month payments came from Beasley. Not only is this slight change in terminology insignificant but it does not concern the modular clinics and testimony regarding these transactions was excluded by the trial judge. The trial judge also offered to call Copelin and Hubbard as the court's witnesses if either the government or defense desired it, but neither side accepted the court's offer.

8. The government formally granted immunity to Copelin, but never to Hubbard.

The Supreme Court, in considering the government's duty to disclose exculpatory material under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), stated:

> But to reiterate a critical point, the prosecutor will not have violated his constitutional duty of disclosure unless his omission is of sufficient significance to result in the denial of the defendant's right to a fair trial . .
>
> The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish "materiality" in the constitutional sense . . . The proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt . . . This means that the omission must be evaluated in the context of the entire record. If there is no reasonable

doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial.

. . . .

United States v. Agurs, 427 U.S. 97, 108, 96 S.Ct. 2392, 2399, 49 L.Ed.2d 342, 352–53 (1976).

When considering Beasley's motion for new trial, the trial judge evaluated the appellant's contention that the government withheld exculpatory material from him. In denying the motion, the district judge stated:

> [T]here is no indication that the Government withheld anything from the Defendant. And, indeed, as the record well shows, when the Court perceived that it was likely that Mr. Copelin would not be called, and a good deal of the testimony seems to revolve around what it did, it proffered the opportunity to examine those witnesses to both parties.
>
> Finally, it is evident from the notes that were given the Defendant that the Defendant knew what in substance Mr. Copelin would say. So I see nothing that was withheld nor anything that would have altered the result
>
> . . . .
>
> Nothing I have heard in this hearing, nothing that has been offered in evidence persuades me that the defendant had aught but a fair trial, nothing I have seen in the evidence

> and nothing I have heard from the witness stand or read in the briefs persuades me that the prosecutor violated the mandates of *Brady v. Maryland* and withheld from the defendant exculpatory material that he should have disclosed.

The record does not support Beasley's argument, the findings of the trial court are certainly not clearly erroneous, and the issue is without merit.

Beasley also assigns as error the district judge's ruling regarding the immunity of Copelin and Hubbard. At the hearing on the post-trial motions, Beasley wanted Copelin and Hubbard to testify regarding what Beasley contended were exculpatory statements made by them about him. Appellant believes that Copelin and Hubbard should have been commanded to testify at this hearing under the statutory or equitable immunity already granted them.[2]

---

2. 18 U.S.C. § 6002 (1976) reads in pertinent part as follows:

> Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—
> (1) a court or grand jury of the United States . . . and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other

[7] The district court observed that the government did nothing to seal Copelin's lips and correctly noted that "[c]learly the government is not required to grant immunity to a witness from prosecution in order to secure him as a witness to someone else." The trial court held that it could require Copelin to testify at the post-trial hearing about any matter within the scope of his grant of immunity, but that it could not require him to testify about any other matters for which he had the right to claim his Fifth Amendment privilege. Hubbard was never given immunity and therefore consistently asserted his right to remain silent, as he was expected to do at the post-trial hearing, and rightfully so. Although Beasley's reason for wanting Copelin and Hubbard to testify at the hearing was to show a contradic-

---

information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order. . . .

Appellant Beasley submits that the disclosures made at the office interviews were "compelled" within the above statute, were made only after the witnesses relinquished their Fifth Amendment right to silence in exchange for immunity, were "ancillary" to the main proceeding, occurred in trial preparation of the pending indictment, and were substantially related to the matters about which the witnesses were granted immunity.

tion, the trial court also found that Copelin's testimony was not "inherently contradictory" of either Wallace's or Moore's testimony. The district court's understanding and application of the law of immunity is correct, and thus we find no error here.

Beasley next asserts that the district court erred when it denied his motion for continuance filed on the morning of trial since a continuance was a simple administrative remedy sought by the defense in order to override the community prejudice generated by Kramer's conviction the day before Beasley's trial commenced. The record reveals, however, that the issue of community prejudice had been raised and considered by the court several times.

[8] Shortly after the indictment was returned, Beasley requested and was granted a change of venue from New Orleans to Jacksonville, Florida on the basis of cummunity prejudice generated by adverse publicity in the media. Under the representation of new counsel, Beasley was later granted a requested change of venue back to New Orleans because allegedly the conditions that existed earlier were no longer present. After Beasley's first trial ended in a mistrial, the district court scheduled the severed Beasley and Kramer trials one right after the other for one and a half months later. Nobody objected. The district court even ordered the jury for Beasley's retrial to be sequestered prior

to the return of the Kramer verdict but, on reconsideration, withdrew its order when neither Beasley nor the government desired sequestration. Furthermore, at the hearing on Beasley's motion for continuance on the morning his trial was to begin, his defense counsel conceded that it had elected only two days earlier to proceed on the scheduled date regardless of the Kramer verdict. Considering the totality of the circumstances, there is no indication that Beasley's trial was fundamentally unfair. *Murphy v. Florida*, 421 U.S. 794, 799, 95 S.Ct. 2031, 44 L.Ed.2d 589 (1975); *Calley v. Callaway*, 519 F.2d 184 (5th Cir. 1975). The district court made every effort to conduct a voir dire that would assure no jurors prejudiced by pre-trial publicity. The district judge found:

> The jury panel was carefully examined with respect to the effect any publicity about the Kramer verdict might have on their consideration of this case. Most of the members of the venire stated they had neither read newspaper accounts, nor seen television accounts, nor heard radio accounts of the case. All prospective jurors who felt that their judgment might be influenced in any way were excused. At the conclusion of voir dire, the court asked counsel to suggest any more veniremen who could be challenged for cause. They suggested none. The voir dire gave counsel an

> opportunity to eliminate any conceivable prejudicial effect the Kramer verdict might have had on this trial, and they took it.
>
> For these reasons, I think the jury panel was not influenced by the pretrial publicity, that the jury selected represented a fair and impartial cross section, and that the trial, whatever its outcome, will be to a jury of the defendant's peers, capable of deciding the case solely on the evidence before it.

The court went out of its way to ensure a fair and impartial jury, one uninfluenced by the results of the Kramer trial. In light of all the above factors, appellant may not complain now as to his trial date or the denial of his request for a continuance.

Three assignments of error raised by Beasley and Kramer are substantially the same, and therefore we shall consider them together.[10] The first attacks the adequacy of the allegations in the indictment and their purported vagueness. Beasley contends first that Count I, the conspiracy count, insufficiently charges an offense against the United States and, second, that the language in the indictment describing the means used by the conspirators to defraud the United States (the submission of "claims

10. Beasley also adopts the remainder of Kramer's assignments of error.

for monies to the State of Louisiana which included approximately $659,-580.00 allegedly representing construction cost for fifteen mobile clinics which were never constructed and the monies derived therefrom were diverted to other purposes . . .") is too ambiguous to reveal the meaning intended by the Grand Jury. Thus, Beasley argues, the conviction on the entire first count must fail because the verdict on this count was a general verdict.

Kramer challenges the district court's denial of his motion to dismiss, reiterating his contentions that the indictment was conclusive in nature, merely alleged a breach of contract in vague and indefinite terms,[11] and failed to set forth the false nature of certain reports voluntarily submitted to the government (Counts IV and V concerned these reports; see n. 2 *supra*). Appellant is especially concerned with the alleged ambiguity of the objects of the conspiracy count, particularly the first object which he submits is unconstitutionally vague and inadequate in notifying the defendant of the charge against him. Both Beasley and Kramer also question the absence of the allega-

11. In particular, appellant submits that the phrase "no legitimate authorized expenditure under the existing contract" as used in the first three counts of the indictment was vague due to various possible interpretations of the phrase "actual operating costs incurred by FHF [Family Health Foundation] in furtherance of the State contract."

tion of willfulness in Counts II and III of the indictment.

[9] It is well settled that there may be a single continuing agreement to commit several offenses by a multiplicity of means. *United States v. Crosby*, 294 F.2d 928, 945 (2nd Cir. 1961), *cert. denied*, 368 U.S. 984, 82 S.Ct. 599, 7 L.Ed.2d 523 (1962); *Mansfield v. United States*, 155 F.2d 952, 953 (5th Cir. 1946).

[10–12] We find that the conspiracy count of the indictment sufficiently informed the defendants of the nature of the charge against them and that it stated in plain, concise, and definite terms the essential facts constituting an offense under 18 U.S.C. § 371, as required by Rule 7, F.R.Crim.P. It is perfectly clear that the indictment alleges a conspiracy to defraud the United States, the making of false claims for money against the United States, and the concealment of material facts within the jurisdiction of a federal agency. Certainly a conspiracy may have more than one objective and these are clear from a fair reading of the indictment. The allegations in the second object of the conspiracy track the language of the substantive false claims statute, 18 U.S.C. § 287, and are therefore permissible providing the indictment sets forth fully, directly, and expressly all essential elements of the crime. *United States v. Lester*, 541 F.2d 499 (5th Cir. 1976), *Downing v. United States*, 348 F.2d 594,

599 (5th Cir. 1965), *cert. denied*, 382 U.S. 901, 86 S.Ct. 235, 15 L.Ed.2d 155; Wright, 1 Fed.Prac. and Proc. 236 (1969). This is especially true where, as here, the charge is made specific as to time and place. See *United States v. McPhatter*, 473 F.2d 1356, 1358 (5th Cir. 1973). We do not find the phrases "actual operating costs" or "no legitimate authorized expenditure" under the contract vague or ambiguous. The indictment contained the elements of the charged offense, apprised the defendants of what they must meet, and specified the extent of the charges in the present indictment to avoid double jeopardy. See *Russell v. United States*, 369 U.S. 749, 763–64, 82 S.Ct. 1038, 8 L.Ed.2d 240 (1962). Thus, the indictment was sufficient and the district court did not err when refusing to dismiss it.

[13] In response to appellants' contention that willfulness is an essential element to a false claim violation under 18 U.S.C. § 287, making the substantive offenses charged in Count II and III fatally defective due to the lack of a willfulness allegation, we simply hold that the concurrent sentence doctrine renders this issue moot. *Roviaro v. United States*, 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 639 (1956); *United States v. Stone*, 472 F.2d 909, 916 (5th Cir. 1973).[12]

12. Appellants rely heavily upon *United States v. Mekjian*, 505 F.2d 1320 (5th Cir. 1975) and *Johnson v. United States*, 410 F.2d 38 (8th Cir. 1968), *cert. denied* 396 U.S. 822, 90 S.Ct. 63, 24 L.Ed.2d 72 (1969). These cases do not provide the comfort sought. *Mekjian* arose under 18 U.S.C. § 1001, where both willfully and knowingly are required by the words of the statute. In *Johnson* the court seems to be holding that when one is charged with knowingly making a false claim and evidence is adduced showing knowledge of the requirements of the contract with the governmental agency and the complete disregard for such, and thereafter the jury is properly charged regarding the necessity of the government proving that such claims were false, fictitious and fraudulent and made knowingly and intentionally, "willfulness" has been established. As pointed out on page 47 of the opinion:

> "Generally, under our system of criminal law, an individual is only punished when he has the requisite criminal intent accompanying the performance of the act. To have this requisite intent, the individual must be aware that what he is doing is wrong." (Citations omitted)

Section 287 certainly meets the test even though the word "willful" does not appear in its text.

In the instant case, the jury was instructed that it must find the defendants knowingly and intentionally violated the law and knowingly and willfully falsified and concealed material facts. Additionally, the indictment charges in Count I that the defendants willfully and knowingly conspired to commit the described criminal offenses. Thus, there does not appear to be any disparity.

The appellants next submit that the indictment fails to allege an offense against the United States in that the charges of false claims, false statements and conspiracy to defraud were all di-

rected to the State of Louisiana and only indirectly against the United States. Beasley argues that the legislative and HEW departmental history of the Aid to Families With Dependent Children program supports the conclusion that Congress intended that criminal prosecution involving the program be brought by state authorities and not the federal government. If Congress is dissatisfied with this or with a state's administration of the program, appellant suggests that Congress can withhold the funds or enact a federal criminal statute for violations. Kramer adds that the state acted as an independent sovereign, not as a fiscal intermediary or agent of the federal government.

Based on these grounds and others, Beasley and Kramer filed motions to dismiss in the court below. In denying the motions, the district judge dealt with appellants' contentions in language totally expressing our conclusions. Judge Rubin stated:

> It is clear that in Title IV–A the Congress, and the promulgators of the federal regulations, hoped to leave with the state agency the major responsibility for administering individual programs. But what they set up, and what the defendants rely upon in their argument, is an administrative structure and a regulatory scheme for checking its functional efficiency. That structure does not affect, and it

> certainly does not even purport to suspend, the criminal laws of the United States. Indeed, part of the Social Security Act that specifically applies to Title IV–A creates a federal, criminal penalty for fraud. See 42 U.S.C. § 1307. A Congress bent on 'insulating' private subcontractors from the criminal laws would hardly create a new federal crime applicable to them.
>
> The indictment charges violations of federal law that do not depend on the particular structure of Title IV–A's administration. It charges that the defendants violated duties created by the criminal laws, not by the Social Security Act. See *Harney v. United States*, 1 Cir. 1962, 306 F.2d 523; *United States v. Thompson*, 6 Cir. 1966, 366 F.2d 167; *United States v. Candella*, 2 Cir. 1974, 487 F.2d 1223, cert. den. 415 U.S. 977, 94 S.Ct. 1563, 39 L.Ed.2d 872. It may be true, as the defendants argue, that they were accountable only to the State of Louisiana for the way in which they administered their Title IV–A program. They are accountable to the United States, however, if they have violated its criminal laws in the course of that administration, just as they would be if they had violated the federal narcotics laws in the course of administering a state program.
>
> Second, the defendants argue that they cannot be held accountable to the

federal government because the work of the Family Health Foundation was done on contract for the state, not the federal government. There is some suggestion, particularly by defendant Kramer, that this prosecution by the federal government violates state sovereignty and freedom of contract, in derogation of the Tenth Amendment. The short answer to these arguments is that the indictment does not charge a breach of contractual duty; it charges a violation of the federal criminal law. It would be a strange interpretation of federalism that left the United States unable to prosecute people for the conspiracy to defraud it.

Finally, defendant Kramer argues that he cannot be tried for submitting false claims to the government, as Counts II and III of the indictment charge he did, because the Foundation submitted claims for payment only to the State; the State then made the actual claims for federal reimbursement. To state this argument is virtually to dispose of it. Whether the defendants submitted the false claims themselves or used an intermediary to do so, they are liable if they made the claims knowing they were false and fraudulent. They could not escape liability by using a cats-paw, even if their proxy was the State.

[14] Case law supports federal jurisdiction and a violation of federal criminal law when false claims are presented to the United States through an intermediary. For example, in *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 63 S.Ct. 379, 87 L.Ed. 443 (1942), the defendants were local contractors who contracted with local governmental units to do work on Public Works Administration (P.W.A.) projects. A large portion of the money paid these contractors was federal in origin although payment itself, in the sense of the direct transferring of checks, was done in the name of local authorities after monthly estimates were submitted by the contractors. When charges were brought against defendants for their collusive bidding practices, the Supreme Court was called upon to construe R.S. § 5438,[13] the forerunner of § 287. Holding that this scheme did come within the statute, the Supreme Court stated:

> Government money is as truly expended whether by checks drawn directly against the Treasury to the ultimate

---

13. R.S. § 5438, the forerunner of § 287, began with the language:

> Every person who makes or causes to be made, or presents or causes to be presented, for payment or approval, to or by any person or officer in the civil . . . service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent . . .

recipient or by grants in aid to states . . . These provisions, considered together, indicate a purpose to reach any person who knowingly assisted in causing the government to pay claims which were grounded in fraud, without regard to whether that person had direct contractual relations with the government. 317 U.S. at 544–45, 63 S.Ct. at 884.

In *United States v. Catena*, 500 F.2d 1319 (3rd Cir. 1974), the court affirmed the conviction of a physician who presented false Medicare claims to the United States through Blue Shield and Travelers insurance companies, finding that the evidence showed the defendant had "caused" the false claims to the government. The court did not reach the question of whether the insurance companies could fall within the definition of agencies of the United States,

> because we believe that the indictment and proof were sufficient to sustain the conviction on the theory that the defendant "caused" the private insurance carriers themselves to submit his false claims to the Department of Health, Education and Welfare (HEW) and to the Railroad Retirement Board, which are clearly federal agencies.

Commenting on *Hess, supra*, and its applicability to cases brought under the modern version of the false claims statute, § 287, the court stated:

> It may be contended, however, that the revised version of the statute, which refers to presenting false claims to an agency of the United States but not to *causing* false claims to be presented, precludes conviction of the defendant on the theory of *Hess*. We do not believe that this conclusion would be correct. The "cause" language of the former version of § 287 has clearly been replaced by 18 U.S.C. § 2(b) . . . Just as under the former version of § 287 at issue in *Hess*, under the combination of the present version of § 287 and the present § 2(b) a person may be guilty of causing a false claim to be presented to the United States even though he uses an innocent intermediary (in this case the insurance carriers) to actually pass on the claims to the United States. [citation and footnotes omitted]. 500 F.2d at 1322–23.

In *United States v. Del Toro*, 513 F.2d 656 (2nd Cir. 1975), the defendants were convicted of bribing a federal public official, conspiracy to defraud the United States in the performance of its lawful functions, and of several counts of making false declarations. The appellate court found that although an assistant administrator of a New York model cities program who was a city employee was not a public official within the statute making it illegal to offer a bribe to an officer or employee or person acting

on behalf of the United States (18 U.S.C. § 201), the alleged conspiracy was nonetheless within the federal criminal jurisdiction.

In *United States v. Candella*, 487 F.2d 1223 (2nd Cir. 1973), *cert. denied* 415 U.S. 977, 94 S.Ct. 1563, 39 L.Ed.2d 872 (1974), the defendants were convicted of making false statements in matters within the jurisdiction of the United States Department of Housing and Urban Development [HUD]. The circuit court held that even though the affidavits submitted by the defendant-movers were executed on forms prepared by the city and not by HUD, the affidavits were within the purview of the false claims statute where the city entered into contracts with the United States on specific urban renewal projects which prompted the moving, the United States became ultimately responsible for paying 100% of moving expenses incurred by concerns involved, and movers were made aware that the city would make affidavits available to HUD for reimbursement purposes and that false statements would be violative of the United States Code. Affirming the convictions and upholding federal jurisdiction, the court distinguished *Lowe v. United States*, 141 F.2d 1005 (5th Cir. 1944):

> In that case, an employee of a private shipbuilder made a false statement to his foreman as to the number of hours

> he had worked on a particular day. The company had an agreement with the United States Maritime Commission under which it was reimbursed for its payroll costs. The court held that the payroll department of the shipyard company was not an agency of the United States, nor was it controlled or supervised by the federal agency. Hence, there was no offense against the United States. The fact pattern here was, of course, markedly different. Urban renewal is a joint enterprise of the City and the Federal Government. Each government cooperates in the funding of federally assisted projects. The City is responsible for administering federally funded projects, as well as those in which it provides the funding alone. The City's procedures for direct payment to movers are subject to explicit regulation, supervision and audit by HUD. 487 F.2d at 1226.

In *Harney v. United States*, 306 F.2d 523 (1st Cir. 1962), federal jurisdiction was sustained over an indictment which alleged that defendants and others conspired to divert to their personal use money which was paid by the Commonwealth of Massachusetts for realty condemned for a federal aid highway, in derogation of the purposes of the federal aid highway program. Finding that the indictment alleged an offense under 18 U.S.C. § 371, the court held:

> [C]heating or overreaching the Commonwealth with respect to the amount it paid for land taken by it for federal highway purposes would in the end expend itself upon the federal government to the extent of 90% under the federal aid road act thereby obstructing one of its lawful functions and if successful subjecting it to pecuniary loss by causing it to pay more than it needed to for the land. The legal sufficiency of the indictment is so clear as not to require further discussion. [Citations omitted]. 306 F.2d at 527.

The same rationale has been followed under similar circumstances.[14]

[15] Thus, we hold that false claims submitted to the state when the claimants knew that the state would rely on these claims for reimbursement from the federal government pursuant to a joint federal-state program fall within the federal false claims statute. Therefore, the claimants' actions satisfy federal criminal jurisdiction and the indictment is sufficient in this respect.

---

14. For further examples, see *United States v. Bass*, 472 F.2d 207, 212 (8th Cir. 1973), *cert. denied*, 412 U.S. 928, 93 S.Ct. 2751, 37 L.Ed.2d 155 (1974) (affirmed conviction for false and fraudulent statements when defendants misrepresented to general contractor and ultimately United States Air Force unacceptable component parts for aircraft as acceptable parts); *United States v. Waters*, 457 F.2d 805 (3rd Cir. 1972) (false statements made to Urban League of Philadelphia, a contractor with the United States Department of Labor); *Ebeling v. United States*, 248 F.2d 429 (8th Cir. 1957), *cert. denied sub nom., Emerling v. United States*, 355 U.S. 907, 78 S.Ct. 334, 2 L.Ed.2d 261 (subcontractor knew or should have known that false invoices submitted to prime contractor doing work for the United States Department of Army bore relation to matter within federal agency and within federal jurisdiction); *United States v. Thompson*, 366 F.2d 167 (6th Cir. 1966) (defendants who, as members of county council, solicited and received kickback from architects on county hospital project under federal Hill-Burton Act in return for causing employment of architects for such project held to have violated general conspiracy statute and committed offense against the United States).

[16] Kramer next contends that there was insufficient evidence to support a finding that he had the requisite intent to commit the alleged offenses. We have reviewed the record and conclude that the intent of the defendant presented a classical jury question. There was certainly ample evidence for submission of this issue to the jury and they resolved it. Thus, this assignment of error is frivolous.

[17] Appellant Kramer also claims he was denied due process of law because of the admission into evidence of testimony which he suggests was highly prejudicial and irrelevant to the material facts at issue. Appellant is referring here to evidence of money received by him from the Foundation for salary, legal services,

travel expenses for him and his family, and severance pay. He contends that even if this evidence supported other crimes, those crimes were not similar to the ones charged here and thus the admission of such testimony was reversible error especially in the absence of a limiting instruction regarding its purpose.

We find this evidence was properly admitted. In addition to showing a pattern in appellant's conduct, this evidence assisted the finders of fact in ascertaining the accuracy, truthfulness and sincerity of appellant's testimony on direct examination regarding his financial status and relationship to the Family Health Foundation.

Kramer next complains that he was placed in double jeopardy by being subsequently tried after the granting of a severance during the first trial. The record reveals that Beasley originally filed a motion for severance based on the assertion that Kramer would testify on Beasley's behalf if they were not tried jointly. The judge held the motion in abeyance, stating that he would grant the severance if Kramer testified in accordance with his affidavit which accompanied Beasley's motion. When Kramer was called by Beasley he took the witness stand and did indeed testify as he said he would. The court then took a recess and held a conference with counsel. At the conference, the judge offered to grant the severance and a mistrial as to Kramer, if Kramer after giving it serious thought made a motion for a mistrial. During the course of the conference the judge stated:

> I do propose, unless there is some thought that Mr. Kramer is being placed in double jeopardy or that his interests are not served by his motion for a mistrial, to grant it in his own interest.

Kramer emphasized that he did not wish to waive any right to a claim of double jeopardy at another trial but then made a motion for mistrial, which the court granted. The trial continued as to Beasley, and the government subsequently started a new trial against Kramer.[15]

The government submits that Kramer's motion for mistrial (which it urges served Kramer's own interests) fits within the general rule that such a motion removes any bar to re-prosecution[16] and that this case does not fall within the exceptions where judicial or prosecutorial overreaching occurred.[17]

---

15. The jury at Beasley's first trial returned a hung verdict causing a mistrial, so the government also started a new trial against Beasley.

16. *United States v. Jorn*, 400 U.S. 470, 485, 91 S.Ct. 547, 27 L.Ed.2d 543 (1971); *United States v. Iacovetti*, 466 F.2d 1147 (5th Cir. 1972), *cert. denied*, 410 U.S. 908, 93 S.Ct. 963, 35 L.Ed.2d 270 (1973); *Vaccaro v. United States*, 360 F.2d 606 (5th Cir. 1966).

17. *United States v. Jorn*, *supra*, n.16. *Gori v. United States*, 367 U.S. 364, 369, 81 S.Ct. 1523, 6 L.Ed.2d 901 (1961); *United States v. Dinitz*, 492 F.2d 53 (5th Cir. 1974).

On the other hand, Kramer argues that he did not consent to a mistrial or voluntarily ask for it, but was forced to request it in order for the court to grant a severance, a condition the court did not impose when originally ruling on the severance motion or prior to Kramer taking the witness stand.

[18–23] We find no misjoinder on the face of this indictment and under the facts of this case. The procedure followed by the lower court is perfectly proper. A motion for severance based on exculpatory testimony offered by a co-defendant may await disposition until the trial judge has the opportunity to determine the content of the defendant's testimony. A motion for separate trial is addressed to the discretion of the trial court, reviewable only for abuse of discretion. *Byrd v. Wainwright*, 428 F.2d 1017, 1018 (5th Cir. 1970). There was no abuse of discretion here. It should also be noted that appellant did not raise the issue of former jeopardy prior to his second trial as required by Rule 12(b) of the Federal Rules of Criminal Procedure.[18]

---

18. Appellant claims he did not pursue the former jeopardy issue before the trial court for two reasons: first, because he expected an adverse ruling due to the judge's comments at the conference regarding Kramer's motion for mistrial, and secondly, due to extensive pre-trial publicity, Kramer felt there was a great potential for prejudice to the prospective jurors which might result from appellant's unsuccessful attempt to avoid prosecution by utilization of a technicality.

This Court does not sympathize with either of the above reasons. A defendant cannot read a judge's mind and therefore should not hesitate to make a motion simply because it was once denied previously. In the instant case the judge had not even denied the motion but had only declined at that time to forecast a ruling either way. Furthermore, voir dire would have eliminated any prejudicial jurors so that appellant should not have let this fear influence him. Double jeopardy is hardly a technicality.

[24] Next, Kramer asserts the district court at the conclusion of Moore's testimony erroneously instructed the jury, over defense objections, as to the law on recantation of false testimony.[19] Appellant contends that the instruction given by the court at the specific time it was given led the jury to believe that the witness Moore was no longer subject to prosecution for perjury or false declarations when, if the jury knew Moore was still subject to prosecution, they may have scrutinized the witness' credibility more carefully.

19. The judge instructed as follows:

There is a provision in the laws of the United States to the effect that if a witness is called before a grand jury and even though he has once told an untruth before the grand jury, if ultimately before the proceedings of that grand jury are completed he recants and tells the truth he may be exonerated for the perjury previously committed. The reason for that law is to give a person

We find that the language used by the trial judge, if error, was not prejudicial to the appellant. Although technically it may not have been correct, in the context of what the judge was doing, the instruction given was satisfactory.

Kramer also complains that the jury instructions given at the conclusion of the trial constituted plain error. Appellant contends the court failed to give any instructions or proper instructions regarding the words "false, fictitious or fraudulent," a requirement of willfulness, the meaning of "no legitimate authorized expenditures" and "actual operating cost", the need for witness protection, and the testimony of an accomplice.

---

who later repents a chance to exonerate himself by telling the truth. Obviously if a person who does not recant and tell the truth [he] may be charged with perjury and indeed, if what he last says is untrue he may still be charged with perjury, but it is to hold some incentive out to a person who initially decides that he ought to lie to change his story and tell the truth if he has the will to do so

Appellant suggests the court's instruction was erroneous in two respects: (1) in addition to a person admitting the falsity of previous testimony, § 1623 also requires that the original declaration must not have substantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed; and (2) a person committing perjury may still be prosecuted under 18 U.S.C. § 1621 despite his recantation under § 1623(d).

[25] Appellant registered no timely objection to the court's instructions to the jury, nor requested further instructions. Rule 30, F.R.Crim.P., thus precludes review of the jury instructions unless plain error under Rule 52, F.R. Crim.P., is present. Considering the record as a whole, we find that there is no plain error under the instant facts.[20] The evidence against the appellant is overwhelming and the instructions given to the jury did not in any way prejudice him.

Briefly, Kramer's next contention is that proof of more than one conspiracy caused a variance between the indictment and the evidence, affecting substantial rights of the appellant. The proposed different conspiracies are (1) conspiracy relating to the payment of funds to Copelin and to presentation of false claims, and (2) conspiracy to conceal past activities of the Foundation.

[26] Our review of the record indicates that one conspiracy was alleged and proved. A conspiracy with multiple objectives in no way negates the existence of that conspiracy.

---

20. According to the Record, the charge to the jury did include the standard instruction on credibility of witnesses with the admonition to consider the motives and relationship of the witness. The instructions also included brief statements by the trial judge regarding protection of witnesses and the fact that no inference is to be drawn from other people's names in the indictment.

[27] Finally, Kramer asserts that as a matter of law the reports described in the third object of the conspiracy are immaterial to any matter within the jurisdiction of a federal agency, and further, that there is insufficient proof to establish an agreement to deceive HEW by the submission of these documents. Thus, appellant contends the lower court erred by not granting his motion to dismiss the third object of Count I or, alternatively, should have granted his motion for acquittal as to that portion of Count I.

The Supreme Court in *Bryson v. United States*, 396 U.S. 64, 70–71, 90 S.Ct. 355, 24 L.Ed.2d 264 (1969), held that the term "jurisdiction" in Title 18, U.S.C. § 1001 should not be given a narrow or technical meaning. The court further held that a statutory basis for an agency's request for information provides jurisdiction enough to punish fraudulent statements under § 1001. In *United States v. Lambert*, 501 F.2d 943, 946 (5th Cir. 1974), the court held that the § 1001 language "matter within jurisdiction" of a federal agency must be given a broad, non-technical meaning.

HEW had statutory authority to conduct the audit herein and any matters related to the audit fell within the "jurisdiction" of that agency. In ruling on the defendant Beasley's motion to suppress audit evidence, the district judge reviewed the statutory authority which

empowered HEW to conduct the audit and concluded:

> Under the federal regulations in effect at the time the audit was commenced and under the regulations that became effective during its course, the HEW audit of the Family Health Foundation was authorized.

Thus, the reports about which Kramer now complains (the "Modular Clinic Report" and the "Response Audit") were material to the proof of the conspiracy and its third objective and are within the jurisdiction of a federal agency. Once again, there is an abundance of evidence in this matter and this issue is without merit.

CONCLUSION

We hold that the district court did not err in overruling appellant Beasley's alternative motion to dismiss the indictment or for new trial. There is substantial evidence, taking the view most favorable to the government, *Glasser v. United States*, 315 U.S. 60, 80, 62 S.Ct. 457, 86 L.Ed. 680 (1942), to support the verdicts of the juries.

The convictions of Beasley and Kramer are affirmed and the denial of Beasley's motion to dismiss or, in the alternative, for new trial is affirmed.

APPENDIX B

Judgment of the Court of Appeals Affirming the Conviction

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 75-2223

D. C. Docket No. CR-74-149 "C"

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

—versus—

JOSEPH D. BEASLEY, M.D.,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Louisiana

Before GOLDBERG, SIMPSON and FAY, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

April 8, 1977

APPENDIX C

Judgment of the Court of Appeals Affirming the Order Refusing to Dismiss the Indictment or to Order a New Trial

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 75-4147 "C"

D. C. Docket No. CR-74-149

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

—versus—

JOSEPH D. BEASLEY, M.D.,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Louisiana

Before GOLDBERG, SIMPSON and FAY, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the District Court appealed from, in this cause be, and the same is hereby, affirmed.

April 8, 1977

APPENDIX D

Opinion of the District Court Delivered Upon the Order Refusing to Dismiss the Indictment or to Order a New Trial

UNITED STATES OF AMERICA,

v.

JOSEPH D. BEASLEY, *et al.*

No. 74-149

United States District Court,
Eastern District of Louisiana

November 5, 1975

ALVIN B. RUBIN, *District Judge:*

I don't believe anything would be gained by further reflection on this matter, therefore, I am going to decide it at this time.

I think counsel understand that the fact that I decide a matter orally from the bench by oral reasons doesn't mean that this in any way denegrates the motion. It simply means that I don't think the interest of justice will be served by taking it under advisement and going through the lengthy procedure of preparing written reasons.

Fundamentally this motion rests upon the notion or the thesis that if the Government withheld evidence from the Jury that was exculpatory in nature and was unknown to the Defendant and thus secured a conviction, justice should not permit the conviction to stand. And, indeed, none may quarrel with that, because the duty of the prosecutor is not to secure a conviction but to see that justice is done.

And so if he withholds material that would tend to exonerate the Defendant, he has defeated the ends of justice.

There is, however, a difference, of course, between the withholding of information improperly and the granting of a new trial merely because the Defendant elected a trial strategy that failed.

Dealing fundamentally with the testimony of Mr. Copelin and Mr. Hubbard, it seems to me essential to show several things:

Not what Mr. Carriere thought the testimony would be, but, first, what the testimony would have been at the first trial had the witnesses been called.

And, secondly, that this was improperly withheld from the Defendant.

And, third, that it would have tended to exonerate the Defendant.

None of those things have been shown, not one.

In the first place, I think all the evidence points to the fact that if Mr. Copelin or Mr. Hubbard or both would have been called at the first trial, they would have done what they have done at this hearing, they would have claimed the benefit of their constitutional right and this court would have sustained that claim, as indeed the Constitution requires it to do.

Secondly, there is no indication that the Government withheld anything from the Defendant. And, indeed, as the record well shows, when the Court perceived that it was likely that Mr. Copelin would not be called, and a good deal of the testimony seems to revolve around what it did, it proffered the opportunity to examine those witnesses to both parties.

Finally, it is evident from the notes that were given the Defendant that the Defendant knew what in substance Mr. Copelin would say. So I see nothing that was withheld nor anything that would have altered the result.

It's suggested that somewhere later in the State Court proceedings one of the prosecutors said Copelin was not called because in some respects his testimony would have contradicted Wallace and Moore. That may or may not be a correct appraisal of the state of mind of the prosecutor.

I have read Copelin's testimony, and I don't think it was inherently contradictory of either Wallace's or Moore's testimony so far as it went.

He was not examined in any respect with regard to the Moore transaction.

He was not examined in any respect with regard to anything that Mr. Wallace testified about except the manner of obtaining the thousand-dollar payments that seem admittedly to have been made. So I don't see how, even if that was the opinion of the United States Attorney, it would amount to anything.

Clearly Mr. Copelin could not have been examined over his claim of privilege about the SEDFRE transaction because there had been no grant of immunity with regard to that.

Now, of course, we can go off on a digression and say, well, if he had not claimed immunity, then his testimony about the

SEDFRE transaction, whoever was a conduit for whom, would have been different; but there is no reason for me to believe that Mr. Copelin would have done any differently than he did today, than he did one week ago or than his attorney said one week ago that he would have done at any previous time, and one would have to be somewhat less experienced in the observation of human beings than anyone who has practice long enough to be a federal judge to assume that Mr. Copelin would have voluntarily testified in favor of Dr. Beasley with respect to matters to which he had no immunity.

Mr. Copelin has, as is his Constitutional right to do, on every occasion when he testified about these, refused – on every occasion when he was interrogated about these transactions, refused to testify, save on one, and that was the occasion when he was granted statutory immunity.

He, of course, was entitled to claim his privilege. He is entitled to claim his privilege even if it means that he will not help someone else. I think he would have claimed his privilege as to the SEDFRE transaction at the time of the prior trial just as he did today.

Some metaphor is used, their lips are now sealed, as if the U.S. prosecutor had done something to seal Sherman Copelin's lips.

I don't think the U.S. prosecutor has done a thing to seal his lips.

The U.S. prosecutor has neither aided nor deterred that process.

Clearly the Government is not required to grant immunity to a witness from prosecution in order to secure him as a witness to someone else. The use of the statute for that would be clearly improper, because the statute says what immunity is to be granted for; it is to assist in the prosecution. And so for the Government to have given Sherman Copelin immunity for his own alleged misdeed for the purpose of helping someone else, for his alleged misdeeds would clearly be a misuse of the statute.

Even if it would not be a subversion of the statute to do that, certainly the Government was not compelled to do it.

With respect to Mr. Hubbard, I have held today, and I think properly, and no one really, I believe, controverted it, that Mr. Hubbard has immunity, now, I mean he has the right to claim the privilege, he lacks immunity, now, he lacked immunity when the trial occurred before, and he has never been given the statutory shield of immunity.

He elected, when called as a witness a week ago, to claim his Constitutional right not to incriminate himself. He reasserted that privilege today.

There is no reason to believe that he would have done anything different at the prior trial. So, it seems to me on every score the suggestion that there was some impropriety by the Government in withholding from counsel for Dr. Beasley and from Dr. Beasley information that would have exonerated Dr. Beasley and was available to him or to the Government is mistaken.

It was obvious to me that the – and a reading of the memorandum which are in the record reflect that Mr. Copelin and Mr. Hubbard have taken no position adverse to Dr. Beasley in their memorandum, they simply are doing what is their Constitutional right to do, indeed, they seek to protect themselves as the Constitution permits them to do.

In Mr. Copelin's memorandum, he indeed supports Dr. Beasley's position while vehemently asserting his privilege.

I turn to the other basic set of issues in the case, and, that is, whether the testimony of Mr. Moore should have been suppressed because of a misuse of the Grand Jury process.

First of all, the record shows that a complete transcript of Mr. Moore's testimony, or at least of his statement, was given to the Defendants at the prior trial, they knew what Mr. Moore had to say. But I don't believe that, quite apart from that, there is a factual situation presented before me where the sole or principal purpose of calling Mr. Moore before the Grand Jury was one of gathering evidence against Dr. Beasley.

It is true that the result of Mr. Moore's recantation was to make available evidence against Dr. Beasley, but the situation seems to me to be in large degree controlled by the decision of the Fifth Circuit Court of Appeals in the case in re: Grand Jury proceedings of Robert W. Beaverly versus United States, 468 Fed. 2nd, 732, where the Court says:

It is improper to use the Grand Jury for the purpose of preparing an already pending indictment for trial. It is a misuse of the Grand Jury to use it as a substitute for discovery.

And then it continues, the situation before us is not one where the sole or principal purpose in further inquiry of appellant is to gain information for the trial of the Gainsville Six. Here the indictment against the Gainsville Six identified two of the appellants as co-conspirators and further charged that other persons to the Grand Jury unknown participated in the conspiracy.

The proper purpose for subpoenaing appellants to inquire of them as to the surrounding circumstances with a view to discovery of the identity of the alleged unknown persons.

And then it went on to say, that even if their issue were more doubtful, there was a presumption of regularity in the Grand Jury proceedings.

I think there was a proper purpose to call Ronnie Moore before the Grand Jury the third time; I don't think it was a mere subversion of the Grand Jury. Even if I am wrong in that belief, though, we remain with the question that I put to counsel:

Even if the prosecutor misused the Grand Jury, does that mean that the evidence must be suppressed?

And counsel have been unable to refer me to any instance where this ever has been done.

I am aware that there are statements that that might be done, statements counsel call overt dicta, which are decided by the Court.

The notion that evidence tells the truth ought to be ex-

cluded because there is some impropriety in gathering it is one that comes into some criticism. Clearly if there is a constitutional violation in gathering evidence, it ought to be suppressed, that's the remedy, that's the decision in Map versus Ohio and a good many other cases, that the Government ought not to benefit by a violation of someone's constitutional rights.

But there is also a good deal of literature that, and I hope I will be pardoned the reference, I don't mean it in personal terms as to anyone involved in this proceeding, that the thief should not go free because the constable blundered.

The question of what is an appropriate remedy for an abuse is one that is not always referable to a suppression of evidence; or to put it another way:

It is not necessarily true that because a witness could properly refuse to testify if called before a Grand Jury, that if he does testify, and it was improper to call him, then his evidence might be suppressed or must be suppressed.

Finally, I don't believe that with respect to that matter much more, if anything more, is known now than was known at the time of the trial.

It is true, and again I say this without reference to personalities, it is one of the things in the case that has to be taken into account, that each of us after something is done and fails can think of a better way to do it or at least to try it, and we are all better quarterbacks after the play has failed.

If it succeeds, why, of course, one need not second-guess it.

I think counsel for Dr. Beasley in the prior trial knew certain considerations with respect to Ronnie Moore, as they did with respect to Sherman Copelin and Don Hubbard, and for whatever strategic or tactical reasons they chose to proceed as they did, they did it because they thought that strategy at that time was in the best interest of their client. We know that, as a matter of the record, that strategy failed insofar as persuading the Jury. So one can always say, well, perhaps something different should have been done, and one way to get another chance

to do it is to blame it on the prosecutor, that he led the defense into error by unscrupulously unconstitutionally withholding that. And I really have not seen evidence that the prosecutor did that.

Certainly, the function of the Court is not to whitewash the prosecution, and I think I indicated on a prior hearing that this court would make its own determination of what the law was, and the fact that the prosecutor thought the law was one thing or another would not be controlling in this court's determination, and I think I approached the matter of viewing the prosecutorial conduct at the trial with impartiality, because if indeed it was unconstitutionally unscrupulous, amounted to a withholding of evidence, that it was the duty of the prosecutor to divulge, I would not hesitate to order a new trial in the interest of justice.

Nothing I have heard in this hearing, nothing that has been offered in evidence persuades me that the Defendant had aught but a fair trial, nothing I have seen in the evidence and nothing I have heard from the witness stand or read in the briefs persuades me that the prosecutor violated the mandates of Brady versus Maryland and withheld from the Defendant exculpatory material that he should have disclosed.

For these reasons the motion for a new trial is denied and the motion to dismiss is denied.

Supreme Court, U. S.
FILED
OCT 20 1977
MICHAEL RODAK, JR., CLERK

No. 77-54

In the Supreme Court of the United States

OCTOBER TERM, 1977

JOSEPH D. BEASLEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,

BENJAMIN R. CIVILETTI,
Assistant Attorney General,

JEROME M. FEIT,
PATTY ELLEN MERKAMP,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

INDEX

Page

Opinions below 1

Jurisdiction 1

Questions presented 2

Statement 2

Argument 4

Conclusion 11

CITATIONS

Cases:

Brady v. *Maryland*, 373 U.S. 83 5

Earl v. *United States*, 361 F. 2d 531, certiorari denied, 388 U.S. 921 10

Kilgo, In re, 484 F. 2d 1215 10

Kramer v. *United States*, No. 77-5040, certiorari denied, October 3, 1977 ..... 2, 4

United States v. *Agurs*, 427 U.S. 97 ..... 6, 7, 8

United States v. *Alessio*, 528 F. 2d 1079, certiorari denied, 426 U.S. 948 10

United States v. *Allstate Mortgage Corporation*, 507 F. 2d 492, certiorari denied, 421 U.S. 999 10

United States v. *Braasch*, 505 F. 2d 139, certiorari denied, 421 U.S. 910 9

United States v. *Graham*, 548 F. 2d 1302 10

United States v. *Nixon*, 418 U.S. 683 11

Page

Constitution and statutes:

U.S. Constitution, Fifth Amendment 9

Social Security Act, Title IV-A, 49 Stat. 627, as amended, 42 U.S.C. (and Supp. V) 601 *et seq.* 3

18 U.S.C. 2 2

18 U.S.C. 287 2

18 U.S.C. 371 2

18 U.S.C. 1623(d) 5, 9

18 U.S.C. 6003 9

18 U.S.C. 6003(b) 10

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-54

JOSEPH D. BEASLEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App.. A) is reported at 550 F. 2d 261. The oral opinion of the district court (Pet. App. D) is unreported.

JURISDICTION

The judgments of the court of appeals (Pet. Apps. B, C) were entered on April 8, 1977, and a petition for rehearing was denied on May 10, 1977 (553 F. 2d 100). On June 3, 1977, Mr. Justice Powell extended the time for filing the petition for a writ of certiorari to July 9, 1977, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court abused its discretion by denying petitioner's motion for a new trial based on allegedly newly discovered evidence or alleged prosecutorial misconduct.

2. Whether the government abused the grand jury process by recalling a witness before the grand jury, after petitioner had been indicted, for the purpose of allowing the witness to recant his prior perjurious testimony.

3. Whether, in the circumstances of this case, petitioner was denied a fair trial by the government's refusal to grant immunity to witnesses whom petitioner believed might testify in his behalf at a post-trial hearing.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Louisiana, petitioner was convicted on one count of conspiracy to defraud the United States, in violation of 18 U.S.C. 371, and two counts of causing claims to be presented to the United States, knowing them to be false, fictitious and fraudulent, in violation of 18 U.S.C. 287 and 2.[1] He was sentenced to concurrent terms of two years' imprisonment on each count. Following his conviction, petitioner moved for a new trial based on allegedly newly discovered evidence. After a hearing, the district court denied the motion (Pet. App. D). The court of appeals affirmed (Pet. App. A).

---

[1]This was petitioner's second trial. His first trial resulted in a mistrial when the jury failed to reach a verdict. At the first trial, petitioner was tried jointly with his co-defendant, Oscar Kramer, although they were retried separately (Pet. App. 4a). Kramer was also convicted on all three counts, and the court of appeals affirmed (Pet. App. A). Kramer's petition for a writ of certiorari (No. 77-5040) was denied on October 3, 1977.

The evidence at trial showed that petitioner, a medical doctor, was the chief executive officer of the Family Health Foundation, a non-profit corporation that provided family planning services in the State of Louisiana. During 1972, the Foundation developed a program to build mobile clinics in order to serve patients of the Louisiana Family Planning Program. The Foundation was reimbursed for its expenses by the State of Louisiana, which in turn received 75 percent to 90 percent reimbursement from the federal government under Title IV-A of the Social Security Act, 49 Stat. 627, as amended, 42 U.S.C. (and Supp. V) 601 *et seq.* Petitioner overcharged the State $4,400 for each of 12 mobile clinics and also billed the State at the inflated price for 15 clinics that were never built. The $4,400 surplus was paid to the building contractor, who passed the money to the Scholarship, Education and Defense Fund for Racial Equality ("SEDFRE"), a New York consulting firm. SEDFRE in turn served as a conduit for channeling the funds to Sherman Copelin, the director of the New Orleans Model Cities Program, who performed no work for the money received (Pet. App. 5a-7a).

The Foundation had an annual $3.5 million contract with the Model Cities Program to staff and maintain neighborhood health clinics. Copelin and his associate, Don Hubbard, asked petitioner for $100,000 as "seed money" from the Foundation to start a consulting firm. Petitioner and his executive assistant, Eugene Wallace, told Copelin that the Foundation did not have $100,000, but that they could put Hubbard on the Foundation's payroll and could give Copelin $50,000 cash. At petitioner's direction, Oscar Kramer, comptroller of the Foundation and director of the Louisiana Family Planning Program, devised the plan of adding to the actual construction costs of the mobile clinics as a way of obtaining

the needed cash. Hubbard obtained the approval of Ronnie Moore, the executive director of SEDFRE, to use SEDFRE as a conduit for funneling the money to Copelin. Kramer instructed the building contractor to divert the additional $4,400 per unit to SEDFRE as payment for a day care center study. After the payments to SEDFRE were discovered by an accounting firm, Kramer, also at the behest of petitioner, wrote a day care study report using SEDFRE'S name and backdated bills from SEDFRE to the construction company, although SEDFRE had never actually undertaken the day care study and procurement of the study was never a part of the contract between the Foundation and the construction company (Pet. App. 7a-9a, nn. 6, 7; Tr. I 116-119, 132-137, 188-190, 206-209; Tr. III 20-27, 109-130; Tr. IV 30, 146, 174-177, 246-252).

ARGUMENT

Petitioner's claims of error are fully answered by the opinion of the court of appeals and are identical to the contentions presented by co-defendant Kramer in No. 77-5040. The Court denied Kramer's petition for a writ of certiorari on October 3, 1977, and there is no more reason to grant review here.

1. Petitioner's claim that he should have been given a new trial on the basis of newly discovered evidence or government misconduct is not supported by the record.

a. Petitioner contends (Pet. 19-20) that he is entitled to a new trial because he learned after trial that the government allegedly had promised Ronnie Moore, the executive director of SEDFRE, that Moore would not be prosecuted for perjury if he recanted his false grand jury testimony. Prior to trial, however, petitioner received copies of Moore's grand jury testimony and was thus made aware both that Moore had recanted and of the

reasons for the recantation. Moreover, Moore expressly testified on cross-examination at petitioner's trial that, after his attorney had spoken to the government prosecutor, he decided to change his testimony to avoid a perjury prosecution. This decision, Moore testified, stemmed from the fact that his attorney had advised him that, if he testified truthfully, he would be exonerated for the statements made during his first two grand jury appearances, but that, if he lied a third time, he could be prosecuted for perjury (Tr. XVI 198-205). This advice was consistent with the law permitting recantation of false declarations before a grand jury. See 18 U.S.C. 1623(d). In these circumstances, both courts below correctly concluded that there was no secret "deal" between Moore and the government (Pet. App. 12a). This fact finding does not merit further review.[2]

b. Petitioner further contends (Pet. 20-22) that the government violated *Brady* v. *Maryland*, 373 U.S. 83, by failing to disclose that Copelin and Hubbard had made pre-trial statements to the prosecutors that tended to exculpate him. Specifically, petitioner relies upon post-trial testimony by Assistant United States Attorney James Carriere that Copelin and Hubbard were not called as government witnesses against petitioner because their statements were inconsistent to some extent with those of Moore and Wallace. Since petitioner made no request for any such statements, "the prosecutor will

---

[2]Petitioner also contends (Pet. 19) that the district court should not have instructed the jury that Moore had a right voluntarily to recant his testimony (Tr. XVI 234-235). This charge, however, was a correct statement of the law under 18 U.S.C. 1623(d). Moore's decision to testify in order to bar prosecution for making false declarations before the grand jury did not render his testimony involuntary.

not have violated his constitutional duty of disclosure unless his omission is of sufficient significance to result in the denial of [petitioner's] right to a fair trial." *United States* v. *Agurs*, 427 U.S. 97, 108. To be material, "the omitted evidence [must create] a reasonable doubt that did not otherwise exist" (*id.* at 112), and "[t]he mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." *Id.* at 109-110. Even assuming that the undisclosed evidence in this case was actually unknown to petitioner,[3] the evidence was not material under this standard.

Before the grand jury, Copelin had testified not about the mobile clinic payments that were the subject of petitioner's indictment but rather about other payments to him by petitioner while he was the director of the New Orleans Model Cities Program. The government planned to use Copelin as a witness at trial only if petitioner took

[3]Contrary to petitioner's assertion that he was deceived as to the substance of Copelin's story, petitioner or his attorney had met with Copelin and Hubbard prior to trial to discuss petitioner's case. Petitioner's attorney also was informed by Copelin's attorney of what Copelin's testimony would be and agreed that it would be harmful to petitioner (S. Tr. 638-639). ("S. Tr." refers to the transcript of the Louisiana state court hearing on motions by Hubbard and Copelin to quash their state indictment for involvement in the Family Health Foundation matter. This transcript was introduced as Government Exhibit 1 at the hearing on petitioner's new trial motion.) Furthermore, before trial petitioner was given a copy of Copelin's federal grand jury testimony and obtained a copy of the handwritten notes of the prosecutor's interview with Copelin (S. Tr. 623-624). Petitioner therefore was aware of the details of Copelin's statements to the government, and it was for this reason that Carriere did not turn over a summary of his interview with Copelin (H. Tr. 16-18, 25). ("H. Tr." refers to the transcript of the hearing on petitioner's motion for a new trial.)

the stand, to impeach his credibility with these payments. Moreover, in his office interview with Carriere, Copelin admitted that he had done no work for the money received from SEDFRE (S. Tr. 186-192, 216, 220-222). Although Copelin also denied that he initially had been aware of the source of the money, this testimony did not tend to exculpate petitioner: Copelin did not dispute that petitioner was the source of the illegal payments; Copelin simply contended that he personally had no guilty knowledge of that fact at the outset of the scheme. By the same token, Copelin's claim of innocence did not rebut the testimony of either Moore or Wallace that petitioner had authorized the overcharges for construction costs as a method of obtaining funds to channel to Copelin (Tr. XV 99-110; Tr. XIV 174-198). Thus, even assuming (contrary to the district court's express finding; see Pet. App. 48a) that petitioner was unaware that Copelin had denied his own culpability in his discussions with the government, which is exceedingly unlikely in view of his pre-trial meetings with Copelin, this evidence would not have created "a reasonable doubt [about petitioner's guilt] that did not otherwise exist." *United States* v. *Agurs*, *supra*, 427 U.S. at 112.

The government did provide petitioner with a summary of Hubbard's expected testimony. Essentially, Hubbard admitted that he arranged the contract between the construction company and SEDFRE on behalf of the Foundation and that he participated in the cover-up by assisting Kramer in procuring supplies from SEDFRE for use in fabricating the day care center report. Like Copelin, however, Hubbard denied that he knew from the beginning that SEDFRE was to serve merely as a conduit (S. Tr. 190-194, 210-213, 216, 222-223). The government chose not to use Hubbard as a witness, although he would have corroborated much of its evidence, because

parts of his story would have contradicted Moore's statement that Hubbard had maintained from the inception of the plan that SEDFRE was to serve as a conduit. Hubbard claimed that he did not learn this until later, when Kramer told him that the SEDFRE arrangement was a sham and recruited his assistance in the cover-up (S. Tr. 210-213, 226, 228-230). Again, even assuming *arguendo* that petitioner actually was unaware that Hubbard personally denied guilty knowledge, the value of this information to his defense was minimal. Indeed, whatever benefit petitioner could have derived from Hubbard's own claim of innocence would have been substantially outweighed by Hubbard's corrobation of the incriminating testimony of other government witnesses.[4] At no time did Hubbard tell the prosecutors that *petitioner* was unaware that the overcharge of $4,400 per mobile clinic would eventually end up in Copelin's hands.

In sum, the trial judge, who was most familiar with the evidence against petitioner, found after a hearing that the statements of Copelin and Hubbard had not been improperly withheld from petitioner, that these statements would not have tended to exonerate petitioner, and that none of the allegedly newly discovered evidence suggested that petitioner "had aught but a fair trial" (Pet. App. 47a, 53a). We submit that the district court's "firsthand appraisal of the record was thorough and entirely reasonable" (*United States* v. *Agurs, supra*, 427 U.S. at 114) and should not be disturbed.

2. Petitioner complains (Pet. 24-26) that the government misused the grand jury process by permitting Moore to testify before the grand jury subsequent to

[4]It is presumably for this reason that petitioner declined the trial judge's invitation to call Hubbard or Copelin as a court witness (Pet. App. 13a).

petitioner's indictment. As petitioner concedes (Pet. 24), however, the court of appeals acknowledged the prevailing rule that "prosecutorial agents may not use the Grand Jury for the primary purpose of strengthening its case on a pending indictment or as a substitute for discovery" (Pet. App. 10a-11a), but found (as had the district court) that the government's primary purpose in allowing Moore to testify was not improper (*id.* at 11a-12a; H. Tr. 29-31). This finding was correct. Under 18 U.S.C. 1623(d), it was entirely legitimate to afford Moore the opportunity to reappear before the grand jury to recant the false declarations he had made in his two previous grand jury appearances, in order to avoid a perjury prosecution. In any event, even if there were merit to petitioner's allegation that the grand jury should not have heard Moore's testimony, he offers no reason to believe that that testimony led to the discovery of any new evidence or otherwise tainted his trial. See *United States* v. *Braasch*, 505 F. 2d 139, 147 (C.A. 7), certiorari denied, 421 U.S. 910.

3. Petitioner's final claim (Pet. 22-24) is that the government should have granted immunity to Copelin and Hubbard to force them to testify at the hearing on his motion for a new trial.[5] Nothing in the record suggests that the testimony of Copelin and Hubbard at the post-trial hearing would have been helpful to petitioner or would have added to the facts already known. As noted above, petitioner declined the court's offer to call Copelin and Hubbard as witnesses at trial, and petitioner's attorney

[5]At the evidentiary hearing, Copelin and Hubbard stated that they would plead the Fifth Amendment if called to testify (H. Tr. 10). Copelin's prior grant of immunity did not concern the illegal payments related to the mobile clinics, while Hubbard's prior grant of immunity had never been accompanied by a court order pursuant to 18 U.S.C. 6003 (S. Tr. 189).

expressly admitted in the state court hearing that Copelin's testimony would have been very damaging to petitioner. Moreover, not only were Copelin's and Hubbard's claims that they did not know that SEDFRE was a mere conduit not exculpatory of petitioner, but also Assistant United States Attorney Carriere admitted at the state court hearing that those witnesses had denied their guilty knowledge of SEDFRE's true role in their discussions with the government. Since the state court transcript was introduced as an exhibit at the evidentiary hearing on petitioner's motion for a new trial, and since the key facts underlying petitioner's claims were essentially uncontroverted, it is far from apparent that petitioner would have gained anything by a grant of immunity to Copelin and Hubbard.

In any event, under 18 U.S.C. 6003(b), the decision to request immunity for a witness—with its consequent impairment of the government's ability to prosecute—rests within the discretion of the United States Attorney, "when in his judgment" the testimony "may be necessary to the public interest." As the courts have uniformly ruled, the government cannot be compelled to grant immunity to prospective defense witnesses. See, *e.g.*, *United States* v. *Graham*, 548 F. 2d 1302, 1315 (C.A. 8); *United States* v. *Alessio*, 528 F. 2d 1079, 1081 (C.A. 9), certiorari denied, 426 U.S. 948; *United States* v. *Allstate Mortgage Corporation*, 507 F. 2d 492, 494-495 (C.A. 7), certiorari denied, 421 U.S. 999; *In re Kilgo*, 484 F. 2d 1215, 1222 (C.A. 4).[6]

[6] *Earl* v. *United States*, 361 F. 2d 531 (C.A.D.C.), certiorari denied, 388 U.S. 921, on which petitioner relies, does not support his position. In *Earl*, the court held that the judiciary was powerless to change legislation that gave the benefit of an immunity statute only to the government and that any change in the immunity law must come from Congress (*id.* at 534). Although the court remarked that one could argue that when the government grants immunity to its witnesses at trial, the defense should have the same privilege (*id.* at 534, n. 1), that hypothetical situation was not presented in this case.

Petitioner's position, which would require the immunization of persons who may have committed a criminal offense merely upon the representation that the witness would testify on behalf of the accused, would infringe substantially upon the executive branch's "exclusive authority and absolute discretion to decide whether to prosecute a case." *United States* v. *Nixon*, 418 U.S. 683, 693. Particularly in the circumstances of this case, where petitioner sought immunity to force Copelin and Hubbard to testify at a post-trial hearing rather than at trial and made no showing that the testimony of those witnesses was crucial to his claims, the refusal to grant immunity did not deny petitioner a fair trial.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

BENJAMIN R. CIVILETTI,
Assistant Attorney General.

JEROME M. FEIT,
PATTY ELLEN MERKAMP,
Attorneys.

OCTOBER 1977.

DOJ-1977-10

Supreme Court, U. S.
FILED
OCT 31 1977
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1977

No. 77–54

JOSEPH D. BEASLEY, M.D.,

Petitioner,

–against–

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY BRIEF

LEONARD B. BOUDIN
30 East 42nd Street
New York, New York 10017

ARTHUR A. LEMANN, III
P.O. Box 49
New Orleans, Louisiana 70118

Attorneys for Petitioner

On the Brief
HERBERT JORDAN
Rabinowitz Boudin & Standard
New York, N.Y. 10017

October 31, 1977

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1977

No. 77-54

JOSEPH D. BEASLEY, M.D.,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITIONER'S REPLY BRIEF

The purpose of this reply is to call the Court's attention to a disturbingly large number of misstatements of material fact in the Solicitor General's brief. We are deeply concerned by the misstatements, both because they lessen Dr. Beasley's chances for fair consideration of his petition, and because we fear that they evince a relaxation of the Solicitor General's solemn responsibility to state cases accurately and fairly -- particularly on petitions for certiorari where no record is provided to the Court for independent re-

view.[1]

1. The first significant misstatement is that petitioner's "claims of error . . . are identical to the contentions presented by co-defendant Kramer in No. 77-5040," whose petition for certiorari was denied on October 3, 1977. Br.,4.[2] One of the petitioner's principal contentions is not even mentioned in Kramer's petition, namely that due process required the government either to grant immunity to Copelin and Hubbard of to accept dismissal of the indictment. Beasley Pet., pp. 22-23.[3]

---

1 / In times past the Solicitor General has discharged this responsibility admirably, sometimes even calling to the Court's attention matters which are unknown and favorable to the opposing party. See, e.g., Black v. United States, 385 U.S. 26.

2 / Earlier, at pp. 3-4, the Solicitor General purportedly states what the "evidence at trial showed," p. 3. It is obvious from the petition that in reality the statement is of the government's theory of what the evidence showed, many parts of which were contradicted by the defense.

3 / Kramer has filed a petition for rehearing which, we are informed, is on the calendar for the Court's conference on November 11, 1977.

2. In opposing petitioner's contention that he is entitled to relief because of an undisclosed deal with Ronnie Moore (Br., 4-5), the Solicitor General relies entirely upon an argument supporting the lower courts' "fact-finding" that "there was no secret 'deal' between Moore and the government." Br., 5. [4] This emphasis upon facts presumably heightens the Solicitor General's duty to be attentive to the facts and to state them fully and accurately, and certainly heightens our dismay at his failure to do so.

The brief states:

> "Prior to trial, however, petitioner received copies of Moore's grand jury testimony and was thus made aware both that Moore had recanted and of the reasons for the recantation. Moreover, Moore expressly testified on cross-examination at petitioner's trial that, after his attorney had spoken to the government prosecutor, he decided to change his testimony to avoid a perjury prosecution."

Br., 4-5.

---

4 / The Solicitor General does not deny that, if there were such a secret deal, petitioner would be entitled to a new trial under Giglio v. United States, 405 U.S.150 and Napue v. Illinois, 360 U.S. 264.

This statement is extremely misleading.

First, while it is true that petitioner received a copy of Moore's grand jury testimony prior to trial, and while it is also true that the transcript showed that Moore had recanted, it is not true that the transcript accurately indicated "the reasons for the recantation," namely to keep a bargain with the prosecutors. On the contrary the testimony misleadingly indicates a purely voluntary recantation by Moore on his own initiative, without any promises, pressure or statements of any kind from the prosecutors.

Second, while it is true that Moore testified on cross examination at trial that "he decided to change his testimony to avoid a perjury prosecution," Br., 5, supra, it is not true that he "expressly testified" that "his attorney had spoken to the government prosecutor" at any time prior to that decision, id., or that there had been communication of any kind between Moore and the prosecutor prior to the decision. 5/

5/ The testimony expressly indicates only that Moore's counsel contacted the prosecutors prior to Moore's actual appearance before the grand jury, Tr. Mar. 14, 1975, p. 204. Likewise, Moore told the grand jury that his counsel, at Moore's request, contacted the prosecutors "and requested that [Moore] appear before this grand jury" and tell "the entire story." G.J. Tr.p.4.

In short, instead of facing up to the facts and making appropriate legal arguments, the Solicitor General's brief attempts to obscure what the post-trial record unambiguously shows, namely that there was a deal between the prosecutor and Moore, a deal which was sought and initiated by the prosecutor, a deal which was kept secret from petitioner and the jury until after trial.

3. In opposing petitioner's contention that a new trial is required under Brady v. Maryland, 373 U.S. 83, the Solicitor General states that the undisclosed statements of Copelin and Hubbard "were inconsistent to some extent with those of Moore and Wallace." Br., 5. The accuracy of this characterization is of substantial legal importance, because the significance of the "inconsistencies" determines whether the undisclosed evidence is "material" in the constitutional sense. 6/

The Solicitor General's characterization contrasts sharply with the sworn statement of petitioner's prosecutor:

> ". . . both Mr. Copelin and Mr. Hubbard denied Mr. Wallace's story. At some points they agreed, but for the critical points they disagreed . . . . They denied the basic Wallace story. Both of them denied it." State Tr., p. 193.

6/ United States v. Agurs, 427 U.S. 97, 108-113.

In further opposition to petitioner's Brady argument the Solicitor General suggests that petitioner knew what Copelin's testimony would be prior to trial. Br., 6, n. 3. He states as fact that petitioner's attorney "was informed by Copelin's attorney of what Copelin's testimony would be and agreed that it would be harmful to petitioner (St. Tr.638-639)." Id. The only possibly relevant testimony on pages 638 or 639 of the State Transcript is that of a member of the defense team to the effect that prior to trial the defense knew that Copelin had given information to the government and that "the information [he] understood Mr. Copelin had given the government was incriminating . . . ." St. Tr., 639 ll.4-6. This testimony, and the Solicitor General's characterization of it, obscure the crucial fact that the defense did not learn until after trial that in reality the information which Copelin gave the prosecutors was exculpatory in that it refuted the testimony of Wallace on "the critical points." St. Tr., 193, quoted more fully above. 7/

7/ The grand jury testimony of Copelin, Br. 6 n. 3, did not relate to the subject of petitioner's trial. The "handwritten notes of the prosecutor's interview with Copelin," id., do not, so far as we can discern, either inculpate or exculpate petitioner. However, the Solicitor General neglects to mention that the notes pertain only to the first of three or four such

[fn. cont'd. on next page]

We conclude this reply, as we began our argument in the petition, by emphasizing that this case presents important questions concerning the principle that "the attorney for the sovereign . . . must always be faithful to his client's overriding interest that 'justice shall be done.'" United States v. Agurs, supra, 427 U.S. 110-11. The sovereign's loftiest advocate should not lose sight of this principle when defending the work of subordinate government attorneys. He has apparently done so here. The Court should therefore grant the writ in order to resolve the issues presented on the basis of an independent review of the record.

Respectfully submitted,

Leonard B. Boudin
Arthur A. Lemann, III

Attorneys for Petitioner

October 31, 1977

[fn. 7 continued]

interviews, and petitioner received no copies or summaries as to the others.